II. Overview of EO and Interim Rule

A. Overview of EO

On May 15, 2019, President Trump issued Executive Order 13873 "Securing the Information and Communications Technology and Services Supply Chain," (the "Executive Order" or "EO") pursuant to the President's authority under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) ("IEEPA"), the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of Title 3, United States Code.[7] The Executive Order declared a national emergency with respect to the threat posed by foreign adversaries that create and exploit vulnerabilities in ICTS. [8] The Executive Order further found that the "unrestricted acquisition or use in the United States of [ICTS] designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries augments the ability of foreign adversaries to create and exploit vulnerabilities in information and communications technology or services . . . and thereby constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States."

To address this national emergency, the EO grants the Secretary of Commerce (the "Secretary") the broad authority to prohibit or mitigate the concerns arising from any acquisition, importation, transfer, installation, dealing in, or use of any ICTS (a "transaction") subject to the United States' jurisdiction where the Secretary, in consultation with other relevant agency heads, determines that the transaction: (i) involves property in which a foreign country or national has an interest; (ii) includes ICTS designed, developed, manufactured, or supplied by persons owned

[7] Exec. Or. 13873 84 FR 22689 (May 15, 2019).
[8] *Id.*

by, controlled by, or subject to the jurisdiction or direction of a foreign adversary, and (iii) poses certain undue risks to critical infrastructure or the digital economy in the United States or certain unacceptable risk to U.S. national security or U.S. persons.[9]

B. Overview of Interim Rule

On January 19, 2021, Commerce issued an interim final rule (the "Interim Rule") implementing the Executive Order.[10] The Interim Rule was issued following the closure of the public comment period for the proposed rule issued on November 27, 2019. The Interim Rule identifies the ICTS transactions (an "ICTS Transaction") that are within the scope of the rule, including any transaction that:

> (1) Is conducted by any person subject to the jurisdiction of the United States or involves property subject to the jurisdiction of the United States;
> (2) Involves any property in which any foreign country or a national thereof has an interest (including through an interest in a contract for the provision of the technology or service);
> (3) Is initiated, pending, or completed on or after January 19, 2021 . . . .; and
> (4) [Involves one type of ICTS identified in the rule.]

Pursuant to the Interim Rule, the Secretary must determine whether an ICTS Transaction involves ICTS designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary (as defined).[11] In making his determination, the Secretary may consider: (1) whether the party or its component suppliers have headquarters, research, development, manufacturing, test, distribution, or service facilities or other operations in a foreign country, including one controlled by a foreign adversary; (2) personal and professional ties between the party—including its officers, directors or similar officials, employees, consultants, or contractors—and any foreign adversary; (3) laws and

[9] *Id.*
[10] 86 Fed. Reg. No. 11 4909 (Jan. 19, 2021).
[11] *Id.* § 7.100 (c).

regulations of the foreign adversary in which the party is headquartered or conducts operations, including research and development, manufacturing, packaging, and distribution; and (4) any other criteria that the Secretary deems appropriate.[12] Notably, the Interim Rule permits the Secretary to deviate from the Interim Rule's procedures if "the Secretary finds that unusual and extraordinary harm to the national security of the United States is likely to occur . . . ."[13]

The Interim Rule defines foreign adversary as "any foreign government or foreign non-government person determined by the Secretary to have engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons."[14] Further, the Secretary identified six foreign governments and foreign non-government persons as foreign adversaries for the purposes of the EO and Implementing Rule, including: the People's Republic of China ("China"), the Russian Federation ("Russia"), the Islamic Republic of Iran ("Iran"), the Democratic People's Republic of Korea ("North Korea"), the Republic of Cuba ("Cuba"), and Venezuelan politician Nicolás Maduro ("Maduro Regime").[15] Pursuant to the Secretary's discretion, the list of foreign adversaries will be revised as necessary to include other foreign governments and foreign non-government persons that "have engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States . . . ." Such revisions are effective immediately upon publication in the Federal Register without prior notice or opportunity for public comment.[16]

[12] *Id.* § 7.100 (c)(1) – (4).
[13] *Id.* § 7.100 (e).
[14] *Id.* § 7.4(a).
[15] *Id.* § 7.4(a)(1) – (6).
[16] *Id.* § 7.4(b).

If the Secretary determines that an ICTS Transaction involving ICTS designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary poses an undue or unacceptable risk to U.S. national security,[17] then the Secretary may prohibit the ICTS Transaction or propose measures to mitigate the identified risk (the "Initial Determination").[18] The Secretary must then notify the parties to the ICTS Transaction either through publication in the Federal Register or by serving the parties through non-public notice.[19] The Secretary is not required to submit any supporting evidence with this determination.[20]

Within 30 days of the notice, a party to an ICTS Transaction may respond to the Secretary's Initial Determination and may seek to have it rescinded or mitigated.[21] In doing so, the party may, in writing: (a) submit arguments or evidence establishing that insufficient basis exists to support the Initial Determination,[22] (b) propose remedial steps which would negate the basis for the Initial Determination,[23] or (c) request a meeting with Commerce.[24] After receiving a party's response, the Secretary may consider whether any of the provided information affects the Initial Determination.[25]

Within 180 days of commencing the initial review and after issuing an Initial Determination, the Secretary must issue a final determination as to whether the ICTS Transaction is prohibited, not prohibited, or permitted pursuant to the adoption of negotiated mitigation

[17] *Id.* § 7.103 (c).
[18] *Id.* § 7.105 (b).
[19] *Id.* § 7.105(b)(2).
[20] *Id.* § 7.105(c).
[21] *Id.* § 7.107.
[22] *Id.* § 7.107(a).
[23] *Id.* § 7.107(b).
[24] *Id.* § 7.107(d).
[25] *Id.* § 7.108.

measures (the "Final Determination").[26] This Final Determination must describe, among other things, the Secretary's determination and consider and address any information received from a party to the ICTS Transaction.[27] A Final Determination to prohibit an ICTS Transaction is published in the Federal Register.[28]

C. Is the EO and Interim Rule lawful?

As a preliminary matter, it is worth addressing whether the EO and proposed rules are consistent with the President's emergency authority under IEEPA. The EO establishes a broad new regulatory authority not currently authorized by, and in some cases possibly inconsistent with, existing statutes. However, the courts are largely deferential to executive action in furtherance of national security, thus complicating any challenges to the EO's lawfulness.

In *Youngstown Sheet & Tube Co. v. Sawyer,* the U.S. Supreme Court identified the test for determining whether the executive branch has legal authorization for executive action. Justice Jackson (concurring) described the often-cited functionalist test and held that the President's powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress. Justice Jackson identified three categories within which all executive action can be analyzed. First, the President's power is at its maximum when Presidential action is pursuant to express authorization from Congress. Second, the President can only rely upon his own independent powers when his action is unsupported by either a Congressional grant or denial of authority. Here, there is a "zone of twilight" where the President and Congress may have concurrent authority or where the distribution of power is unclear. Any analysis of powers within this category likely depends on the imperatives of events. Finally, the President's powers is at its

[26] *Id.* § 7.109(a).
[27] *Id.* § 7.109(d).
[28] *Id.* § 7.109(f).

lowest ebb when Presidential action is incompatible with the expressed or even implied will of Congress. Here, the President can only rely on his own Constitutional powers, minus any Constitutional powers of Congress over the matter.

Under a category one analysis, the executive branch may argue that Congress authorized presidential action pursuant to IEEPA which authorizes the President to exercise controls over international economic transactions during a declared national emergency. However, IEEPA does not grant the President *express* authorization to exercise the broad new authorities claimed in the EO and Interim Rule. Although the EO's underlying authorities may be unsupported by express Congressional authorization, a category two analysis permits the President to exercise the EO's authorities even where the distribution of power is unclear. Additionally, given the imperatives of events stemming from national security implications, courts are likely to defer in this case to presidential action.

However, one may argue that the broad authorities claimed in the EO are incompatible with the express or implied will of Congress. For example, the Communications Act identifies policy objectives that the FCC must promote including "to make available, so far as possible, to all the people of the United States . . . [telecommunications services]."[29] The Supply Chain EO could affect the telecommunications market in a way inconsistent with the Communications Act and other statutes.

[29] The Communications Act of 1934, 47 U.S.C. § 151 et seq.

III. Does the Fifth Amendment's due process clause constrain the USG's ability to identify and punish companies whose products or services raise supply chain related national security concerns?

A. Has Due Process Been Triggered?

The Due process Clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property without due process of law."[30] To determine whether due process requirements apply, courts look "not to the 'weight' but to the nature of the interest at stake," and those interests must arise from the sort of "liberty or property" protected by the Due Process Clause.[31] The mere deprivation by the government of a protected liberty or property interest is not itself unconstitutional; the deprivation must instead be of a protected interest *without due process of law.*[32] For claimed liberty interests, courts rely on an expansive understanding of liberty.[33] For claimed property interests, however, the underlying benefit need not arise from the Constitution but from "existing rules or understandings that stem from an independent source such as state law."[34]

Notably, the Supreme Court has suggested[35] and lower courts have held[36] that foreign states are not "persons" within the meaning of the Due Process Clause; and therefore, are not entitled to Due Process protections. Similarly, foreign non-state entities "without property or presence in [the United States have] no constitutional rights, under the Due Process Clause or

[30] *See* US Const. Amend V.
[31] *Bd. of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972).
[32] *Gilbert v. North Carolina State Bar*, 363 N.C. 70, 678 S.E.2d 602 (2009).
[33] 408 U.S. 564, 92 S. Ct. 2701 (1972).
[34] *Id.*
[35] *See* Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L.R. 633 (2019) (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992)).
[36] *Id.*

otherwise . . . ."[37] However, foreign non-state entities "that acquire[] or hold[] property [in the United States] may invoke the protections of the Constitution when that property is placed in jeopardy by government intervention."[38] Like foreign non-state entities, foreign state-owned entities ("SOEs") are entitled to constitutional due process protections under the Fifth Amendment unless it can be shown that the SOE has a principal-agent relationship with the state, as described by the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterio de Duba*.[39]

1. Overview of Liberty Interests

The Constitution requires the government to provide due process protections when it harms a person's reputation in connection with the denial of a tangible interest. The first seeds of this right were planted in *Joint Anti-Fascist Refugee Committee v. McGrath*, where the Court held that the attorney general failed to comply with the terms of an executive order when he registered certain entities as "communist" organizations on a list provided to the Civil Service Commission.[40] In his concurring opinion, Justice Frankfurter held that the government designation of groups without prior notice or an opportunity for a hearing "is so devoid of fundamental fairness as to offend the Due Process Clause of the Fifth Amendment."[41] Twenty years later, in *Wisconsin v. Constantineau*, the Court formally identified the liberty to be free from state-created reputational harm as a liberty interest protected by the Due Process Clause,

[37] *Al Haramain Islamic Foundation, Inc. v. United States*, 660 F.3d 1019 (9th Cir. 2011).
[38] *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491–92, 51 S.Ct. 229, 75 L.Ed. 473 (1931).
[39] *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 103 S. Ct. 2591 (1983); *see also GSS Group Ltd. v. National Port Authority* (reaffirming that SOEs are entitled to Constitutional protections).
[40] *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 125 (1951).
[41] 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring).

holding that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[42]

In *Paul v. Davis*, the Court established the modern "stigma-plus" test to determine whether government action that stigmatizes a person's reputation implicates their protected liberty interests. In *Paul*, police chiefs included Davis's name and photograph on fliers distributed to local merchants that identified "active shoplifters."[43] Although Davis was previously charged with shoplifting, he had not been brought to trial and the charges were ultimately dismissed.[44] Davis alleged that the circulation of the fliers impaired his future employment opportunities and ability to shop at local businesses.[45] In articulating the "stigma-plus" test, the Court held that Davis's reputation alone was not a liberty interest protected by the Constitution.[46] Under the "stigma-plus" test, a liberty interest is implicated only when an individual's reputation is stigmatized (the "stigma") in connection with the denial of some specific constitutional guarantee or some more tangible interest (the "plus").[47]

Since *Paul*, courts have held that the government imposes a stigma when it labels a person a national security threat.[48] In *Nat'l Council of Resistance of Iran v. Dep't of State*, the U.S. Court of Appeals for the District of Columbia held that the designation by the Secretary of State of two organizations as "foreign terrorist organizations" satisfied the "stigma" prong.[49] Similarly, in *Latif v. Holder*, the United States District Court, D. Oregon held that placement on the No-Fly List for national security reasons "satisfie[d] the 'stigma' prong because it carrie[d]

[42] *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).
[43] *Paul v. Davis*, 424 U.S. 693, 694-97 (1976).
[44] *Id.*
[45] *Id.* 697.
[46] *Id.*
[47] *Id.* 700-01.
[48] E.g., *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 204 (D.C. Cir. 2010); *Latif v. Holder*, 28 F. Supp. 3d 1134, 1151 (D. Or. 2014).
[49] 251 F.3d 192, 204 (D.C. Cir. 2001).

with it the stigma of being a suspected terrorist that is publicly disclosed to airline employees and other travelers near the ticket counter."[50]

To satisfy the "plus" prong, claimants must show "the denial of some more tangible interest . . ."[51] such as a change of legal status if the claimant "legally [cannot] do something that [he] could otherwise do."[52] Although there is no comprehensive list of tangible interests that satisfy the plus prong, the Fifth Circuit has recognized that "there is a liberty interest in operating a legitimate business."[53] Additionally, the loss of "business good will" protected by law[54] and the loss of opportunity to operate one's business satisfy the plus prong.[55] The D.C. Circuit has recognized that a denial of a tangible interest includes exclusion by the government from work on future government contracts or other government employment opportunities.[56]

2. Overview of Property Interests

The Due Process Clause "protects rather than creates property interests . . . [which] is determined by reference to 'existing rules or understandings that stem from an independent source such as state law."[57] "[T]he fact that the property interest is recognized under state law is enough to trigger the protections of the Due Process Clause."[58]

[50] *Latif*, 28 F. Supp. 3d 1134, 1150 (D. Or. 2014).
[51] *Green v. Transp. Sec. Admin.*, 351 F.Supp.2d at 1129 (W.D. Wash. 2005).
[52] *Miller v. Cal. Dep't of Soc. Servs.*, 355 F.3d 1172 (9th Cir. 2004) (discussing *Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971)).
[53] *State v. Thompson*, 70 F.3d 390, 392 (5th Cir. 1995) (citing *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 701 (5th Cir.1991)).
[54] *Marrero v. Hialeah*, 625 F.2d 499, 514-15 (5th Cir. 1980).
[55] *Texas v. Thompson*, 70 F.3d 390, 393 (5th Cir. 1995).
[56] *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1506, 312 U.S. App. D.C. 427 (D.C. Cir. 1995) (citing *Kartseva v. Dep't of State*, 37 F.3d 1524, 1528, 308 U.S. App. D.C. 397 (D.C. Cir. 1994)).
[57] *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (quoting *Roth*).
[58] *Ralls Corp. v. Comm. on Foreign Inv.*, 411 U.S. App. D.C. 105, 125 758 F.3d 296, 316 (2014).

A person's business, occupation, and livelihood are "property interests" within the protections of the Due Process Clause.[59] Some states consider these rights fundamental and inalienable[60]; however, other states describe these rights as non-fundamental but guaranteed under state constitutions' inherent rights provisions.[61] Additionally, valid contracts are considered "property" for the purpose of Due Process protections[62] "whether the obligor be a private individual, a municipality, a state, or the United States."[63]

B. What Type of Process Is Due?

Pursuant to the *Mathews Test*, to determine what procedural protections are constitutionally due, courts assess (1) the "private interest that will be affected by the official action"; (2) the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) the "[g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[64]

Applying this test, courts have ruled that "those procedures which have been held to satisfy the Due Process Clause have 'included notice of the action sought,' along with the

[59] *Terrace v. Thompson*, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923); *Wooten v. Clifton Forge School Bd.*, 655 F.2d 552 (4th Cir. 1981); *Gosney v. Sonora Independent School Dist.*, 603 F.2d 522 (5th Cir. 1979); *City of Texarkana v. Brachfield*, 207 Ark. 774, 183 S.W.2d 304 (1944); *Laney v. Holbrook*, 150 Fla. 622, 8 So. 2d 465, 146 A.L.R. 202 (1942); *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P.2d 401, 9 A.L.R.2d 1031 (1949); *Mongogna v. O'Dwyer*, 204 La. 1030, 16 So. 2d 829, 152 A.L.R. 162 (1943); *City of Akron v. Chapman*, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953); *Clayton v. Bennett*, 5 Utah 2d 152, 298 P.2d 531 (1956).
[60] *Del Monte Fresh Produce, N.A., Inc. v. Chiquita Brands Intern. Inc.*, 616 F. Supp. 2d 805 (N.D. Ill. 2009); *Rivera-Cartagena v. Wal-Mart Puerto Rico, Inc.*, 802 F. Supp. 2d 324 (D.P.R. 2011) (under Puerto Rico law); Weill v. State ex rel. Gaillard, 250 Ala. 328, 34 So. 2d 132 (1948); Lafayette Dramatic Productions v. Ferentz, 305 Mich. 193, 9 N.W.2d 57, 145 A.L.R. 1158 (1943); Montana Cannabis Industry Ass'n v. State, 2012 MT 201, 366 Mont. 224, 286 P.3d 1161 (2012).
[61] *Ladd v. Real Estate Commission of Commonwealth*, 187 A.3d 1070 (Pa. Commw. Ct. 2018).
[62] *N.H. Lyons & Co. v. Corsi*, 3 N.Y.2d 928, 167 N.Y.S.2d 945, 145 N.E.2d 885 (1957).
[63] *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 78 L.Ed. 1434 (1934).
[64] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

opportunity to effectively be heard."[65] Beyond those two basic requirements, "the precise requirements of procedural due process are flexible"[66] and depend upon "time, place, and circumstances."[67] For example, in *Ralls Corp. v. CFIUS*, the D.C. Circuit held that a company owned by two Chinese nationals and labeled a national security risk by presidential order must "at least . . . be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence."[68]

C. Whether the Interim Rule Triggers Due Process Protections?

1. The Due Process clause does not protect the liberty or property interests of the six foreign adversaries identified in the Interim Rule.

The Interim Rule grants the Secretary the authority to block or mitigate certain ICTS Transactions involving a foreign adversary. Foreign adversary is defined as "any foreign government or foreign non-government person determined by the Secretary to have engaged in a long-term patter or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons."[69] As currently proposed, the Interim Rule identifies six foreign adversaries—including China, Russia, Iran, North Korea, Cuba, and the Maduro Regime—and permits the Secretary to unilaterally designate additional foreign adversaries without prior notice or opportunity for public comment.[70] The Secretary's determination is based on multiple sources, including the National Security Strategy of the United States, the Office of the Director of National Intelligence's 2016-2019 Worldwide Threat Assessments of the U.S. Intelligence Community, and the 2018 National Cyber Strategy of the

[65] *NCRI* (D.C. Cir. 2001).
[66] *English v. District of Columbia*, 717 F.3d 968, 972, 405 U.S. App. D.C. 174 (D.C. Cir. 2013).
[67] *Ralls Corp. v. Comm. on Foreign Inv.*, 411 U.S. App. D.C. 105, 126 758 F.3d 296, 317 (2014).
[68] *Id.*
[69] 86 Fed. Reg. No. 11 4909 § 7.4(a) (Jan. 19, 2021).
[70] *Id.* § 7.4(b).

United States of America, as well as other intelligence reports from the U.S. Government generally. [71]

The Due Process clause does not protect the liberty or property interests of the six foreign adversaries currently proposed in the Interim Rule since these entities are foreign governments.[72] However, the Interim Rule's broad definition of foreign adversary which also includes "non-government person[s]" could result in the designation of foreign entities that qualify as persons entitled to constitutional protections. If constitutional protections do apply to a foreign entity designated as a foreign adversary, the entity could claim that the designation results in a reputational harm consistent with the stigma-plus test. Publicly labeling a foreign entity entitled to constitutional protections a "foreign adversary . . . engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States . . ."[73] imposes a stigma sufficient to trigger a party's liberty interests. To complete the stigma-plus claim, the foreign entity would then need to show the denial of some more tangible interest resulting from the stigma. As currently drafted, a foreign entity entitled to constitutional protections designated a foreign adversary receives no prior notice of its designation and no opportunity for a hearing. Consistent with *Ralls Corp. v. CFIUS*, a qualifying foreign entity would likely be afforded, at a minimum, the underlying evidence on which the Secretary relied in designating the entity a foreign adversary and be afforded the opportunity to rebut that evidence.[74]

[71] *Id.* § 7.2.
[72] *See* Wuerth *supra* note 35 (citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992)).
[73] Exec. Or. 13873 84 FR 22689 Definition of Foreign Adversary.
[74] *Ralls Corp. v. Comm. on Foreign Inv.*, 411 U.S. App. D.C. 105, 129 758 F.3d 296, 320 (2014).

2. Identifying an ICTS Transaction as subject to the Interim Rule's jurisdiction, irrespective of the Initial or Final Determination, triggers Due Process protections.

The mere notice by the Secretary of his Initial Determination, whether through publication in the Federal Register or non-public notice, irrespective of the outcome triggers the liberty interests of a party subject to the transaction. An Initial Determination by the Secretary necessarily means the ICTS Transaction satisfies the Interim Rule's jurisdictional predicate that the transaction involves ICTS designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary.[75] In other words, the Secretary *cannot* make an Initial or Final Determination involving an ICTS Transaction that *does not* involve ICTS designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction of a foreign adversary.

The Initial Determination necessarily implies that a party subject to the ICTS transaction is somehow controlled by or subject to the jurisdiction or direction of a U.S. foreign adversary. Such insinuation or express claim, irrespective of the outcome of the Initial Determination, may impose a stigma that the parties subject to the transaction are connected to a foreign adversary. For example, an Initial Determination might imply that ICTS is "supplied by [U.S. Company A] . . . [which is] controlled by, or subject to the . . . direction of [North Korea]."[76] The resulting stigma from such claim could lead to the "denial of some more tangible interest" such as lost work, cancelled contracts and orders, or other economic damages.

Notably, the Secretary's choice of notice for the Initial Determination could affect whether liberty interests are triggered. If the Secretary issues his Initial Determination through publication in the Federal Register, the parties subject to the transaction would likely have a

[75] 86 Fed. Reg. No. 11 4909 § 7.103(b) (Jan. 19, 2021).
[76] *Id.*

stronger stigma-plus claim since the stigmatizing label is publicly disclosed. Moreover, the plus factor is more likely to be implicated, since the parties' customers and partners are more likely to adjust their business practices in response to the stigma, thus creating a tangible harm to the transaction parties. However, if the Secretary issues his Initial Determination by serving a copy of the Initial Determination on the parties non-publicly, the triggering of the parties' liberty interest is less clear. Such analysis likely depends on who is notified. For example, if multiple parties subject to a single ICTS Transaction are notified that only one of the parties triggered the jurisdictional predicate then that party might be able to raise a stigma-plus claim. However, if the Secretary only notifies one party of his Initial Determination, then that party likely will not have a stigma-plus claim since the implication that the party is owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary is not disclosed widely and would not create any stigma that could result in a tangible loss.

Since a party's liberty interest is implicated by the mere designation that it involves a ICTS transaction connected to a foreign adversary, parties are due certain procedural protections including notice of the action sought.[77] In this case, such notice would be a determination that the a party subject to the ICTS Transaction is "owned by, controlled by, or subject to the jurisdiction of a foreign adversary."[78] As currently written, it is unclear whether the Interim Rule's procedural protections afforded to a party subject to an ICTS Transaction are focused specifically on the claim that the transaction poses and risk to U.S. national security; or instead are focused broadly on the Initial Determination, including that the transaction falls within the jurisdiction requirements of the rule. Regardless, the Interim Rule does not require the Secretary

[77] *Nat'l Council of Resistance of Iran v. Dep't of State (NCRI)*, 251 F.3d 192, 205, 346 U.S. App. D.C. 131 (D.C. Cir. 2001)
[78] 86 Fed. Reg. No. 11 4909 § 7.103(b) (Jan. 19, 2021).

to disclose the basis for the Secretary's determination that the ICTS Transaction itself falls within this jurisdictional predicate. Consistent with the *Mathews Test*, by providing a threshold determination to the parties describing why the transaction itself was deemed an ICTS Transaction within the purview of the rules, the parties could be afforded an opportunity to rebut the claim that the transaction is subject to the Secretary's review.

3. The Initial and Final Determinations by the Secretary that an ICTS Transaction poses an undue or unacceptable risk to U.S. national security triggers Due Process protections.

After the Secretary makes the Initial Determination that an ICTS Transaction poses an undue or unacceptable risk to U.S. national security, the Secretary may prohibit the ICTS Transaction or propose measures to mitigate the identified risk. The Secretary must then notify the parties subject to the ICTS Transaction of his Initial Determination, either through publication in the Federal Register or by non-public notice.[79] Within 30 days of notice, a party to the transaction may respond by submitting evidence, proposing remedial steps which would negate the basis for the Initial Determination, or request a meeting with Commerce.[80] The Secretary's Final Determination, which is published in the Federal Register, must describe the Secretary's determination and consider and address any information received from a party to the ICTS Transaction.[81]

A determination that an ICTS Transaction poses an undue or unacceptable risk to U.S. national security triggers the liberty interests of the parties subject to the transaction by causing reputational harm. Like *Nat'l Council of Resistance of Iran* and *Latif*, the Secretary's designation that a party poses a national security risk—whether disclosed through the Initial Determination

[79] *Id.* § 7.105(b).
[80] *Id.* § 7.107(d).
[81] *Id.* § 7.109(d).

or Final Determination, which is published in the Federal Register—imposes a stigma consistent with the stigma-plus test.[82] After triggering the stigma prong, a party to an ICTS Transaction would then need to show to show the denial of a more tangible interest as discussed previously.

Additionally, a determination that an ICTS Transaction poses a risk to U.S. national security and subsequent finding that the transaction be prohibited triggers a party's property interests. Pursuant to the rule, a Final Determination "will provide a specific description of the prohibited ICTS Transaction and shall be limited in force to the circumstances described therein. Moreover, if the Secretary determines that an ICTS Transaction is prohibited, the final determination shall direct the least restrictive means . . . necessary to attenuate or alleviate the undue or unacceptable risk posed by the ICTS Transaction."[83] At a minimum, such prohibition would likely negatively affect the transaction party's business, occupation, and livelihood. Moreover, the prohibition could affect private or public contracts where a transaction party is an obligee, thus triggering the party's property interests.[84]

Unlike the jurisdictional predicate, the Interim Rule provides multiple procedural due process to parties subject to an ICTS Transaction that the Secretary labels a national security risk. First, a party may "submit arguments or evidence establishing that insufficient bases exists to support the Initial Determination."[85] Second, a party may "propose remedial steps which would negate the basis for the Initial Determination." [86] Third, a party may "request a meeting with Commerce." [87] These procedural protections effectively provide the parties subject to the ICTS

[82] *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 204 (D.C. Cir. 2001); *Latif v. Holder*, 28 F. Supp. 3d 1134, 1150 (D. Or. 2014).
[83] 86 Fed. Reg. No. 11 4909 § 7.109 (Jan. 19, 2021).
[84] *N.H. Lyons & Co. v. Corsi*, 3 N.Y.2d 928, 167 N.Y.S.2d 945, 145 N.E.2d 885 (1957).
[85] 86 Fed. Reg. No. 11 4909 § 7.107(a) (Jan. 19, 2021).
[86] *Id.* § 7.107(b).
[87] *Id.* § 7.107(d).

Transaction the opportunity to be heard.[88] Moreover, the Final Determination must describe, among other things, the Secretary's determination and consider and address any information received from a party to the ICTS Transaction[89] which provides the parties notice of the underlying evidence on which the Secretary relied. A court will likely deem these procedural protections adequate given the precedents established in similar national security-related cases, like *Ralls Corp. v. CFIUS*.

[88] *Nat'l Council of Resistance of Iran v. Dep't of State (NCRI)*, 251 F.3d 192, 205, 346 U.S. App. D.C. 131 (D.C. Cir. 2001).
[89] 86 Fed. Reg. No. 11 4909 § 7.109(d) (Jan. 19, 2021).

IV. Conclusion

Executive Order 13873 grants Commerce broad new regulatory powers to prohibit, mitigate, and unwind certain ICTS transactions that, in the judgement of the Secretary, pose a risk to U.S. national security. Released in January 2021, Commerce's Interim Rule implements the requirements of the EO and establishes the framework the U.S. Government will follow to adequately mitigate ICTS related national security risks. Notably, the Interim Rule includes procedures that afford due process to private entities whose liberty or property interests are impacted by executive action. However, there may be circumstances consistent with the Interim Rule where Commerce takes actions that trigger due process requirements and do not provide adequate procedural protections that are constitutionally due.

The Interim Rule does not afford due process to the six identified foreign adversaries. These six entities do not qualify for constitutional protections since they are foreign states and are not "persons" within the meaning of the Due Process Clause. However, the Interim Rule permits the Secretary to unilaterally designate additional foreign adversaries in the future which may qualify for constitutional protections, such as an SOE or other entity. To avoid triggering a Due Process violation, Commerce should only designate foreign adversaries who clearly do not qualify for constitutional protections and then designate agents of those entities as being "controlled by or subject the jurisdiction" of a foreign adversary pursuant to the Interim Rule's procedural requirements.

Designating an ICTS Transaction as merely subject to the Interim Rule's jurisdiction triggers Due Process protections since such designation necessarily means the transaction involves ICTS designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary. This insinuation could trigger a party's

liberty interests through a stigma-plus claim. Notably, the Interim Rule is unclear as to whether a party notified as being subject to the rule's jurisdiction is afforded due process protections to object to such designation. In the final rule, the U.S. Government should provide a separate procedural framework for parties to contest the jurisdictional predicate designation. This framework could mirror the protections afforded in the Initial and Final Determinations. Additionally, the government should prioritize providing private rather than public notice, at least in its Initial Determination, to limit its exposure to due process claims.

The Initial and Final Determinations clearly trigger a party's liberty interests and could trigger a party's property interests. The Interim Rule likely provides adequate procedural protections to implicated parties as outlined in the regulation. However, disputes may arise regarding whether the underlying evidence on which the Secretary relied in making his determination that is shared with the parties is sufficient. The government should therefore follow the guidance outlined by the D.C. Circuit in *Ralls Corp.*, and provide all access to the unclassified evidence on which the Secretary relied.

Applicant Details

First Name	**Ashley**
Middle Initial	**C.**
Last Name	**Curran**
Citizenship Status	**U. S. Citizen**
Email Address	**accurran@widener.edu**
Address	**Address** Street **402 Uxbridge Way** City **Hockessin** State/Territory **Delaware** Zip **19707** Country **United States**
Contact Phone Number	**(302) 507-4387**

Applicant Education

BA/BS From	**University of Delaware**
Date of BA/BS	**May 2021**
JD/LLB From	**Widener University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50801&yr=2009**
Date of JD/LLB	**May 17, 2024**
Class Rank	**25%**
Law Review/ Journal	**Yes**
Journal(s)	**Delaware Journal of Corporate Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Millar, Nyla
nemillar@widener.edu
Morrell, Jennifer
jrmorrell@widener.edu
3024772116
Carr, Valerie
vcarr@carrlawde.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ashley C. Curran
Hockessin, DE • accurran@widener.edu • (302) 507-4387

June 12, 2023

Dear Judge Sanchez:

I am a third-year student at Widener University Delaware Law School and would be honored to serve as your judicial law clerk for the 2024-2025 term. As I intend to practice law in Philadelphia, I would welcome the opportunity to learn from your experience.

My academic and work experience have prepared me to succeed as a judicial law clerk. Possessing relevant practical skills, my background in research and analytical writing led to success at Widener University Delaware Law School where I currently rank in the top 25% of my class. I am a staff editor on *The Delaware Journal of Corporate Law* and I am preparing to write my note on a corporate law-related topic. Previously, I served as a teaching assistant to Professor N.E. Millar in Legal Methods I, Widener's first-year legal writing class. Here, I worked with Professor Millar to pinpoint common first-year legal research/writing problems. I held workshops, both in class and outside, to highlight these issues and answer student questions. Additionally, I researched the case law for the student's final writing assignment.

Over the past two years, I have refined my writing, research and analytical skills while working for several firms and organizations. This summer, I am a law clerk at Dalton & Associates, focusing on asbestos litigation. Here, I draft briefs in opposition to motions for summary judgment and perform legal research on jurisdiction-specific case law, further developing my legal research and writing skills. I regularly meet with my supervising attorneys to discuss deposition preparation and strategies for opposition motions. We also spend significant time reviewing digests of depositions, case law, and discovery. This past semester, I interned with Widener's Veterans Law Clinic, which provides free legal representation to primarily low-income veterans. There, I worked on several complex appeals to the VA, drafted estate planning documents, and prepared and presented a mock Veterans Board of Appeals hearing.

Previously, I interned at Young Conaway, where I maintained office records, refined my attention to detail, and became skilled in collaboration. At Carr Law, I gained experience drafting estate planning documents, witnessing document signings, and maintaining client files while working closely with my supervising attorney and mentor. I also supported the firm by responding to client inquiries, and handling scheduling and office matters in the absence of my supervisor. As a result of these experiences, I offer strong writing, research, and organization skills, leadership, and initiative, all of which would allow me to make a positive contribution to the Court.

I look forward to the opportunity to speak with you further regarding my qualifications for the judicial clerkship. Should you wish to schedule an interview, I can be reached at accurran@widener.edu or (302) 507-4387. Thank you for your consideration.

Respectfully,

Ashley Curran

Ashley Curran

Ashley C. Curran
402 Uxbridge Way, Hockessin, DE 19707
accurran@widener.edu • (302) 507-4387

EDUCATION

Widener University Delaware Law School, Wilmington, DE — J.D. expected May 2024
GPA: 3.309/4.0
Class Rank: Top 20%
Honors: *Delaware Journal of Corporate Law*, Vol. 48 Staff Editor
Activities: First Generation Law Student Association and Women's Law Caucus

University of Delaware, Newark, DE — B.A. awarded May 2021
Major: History
Minor: Legal Studies
GPA: 3.37/4.0
Honors: Phi Alpha Theta Fraternity, Dean's List in Spring 2019, 2020 and Fall 2020
Memberships: Alpha Xi Delta Sorority

PROFESSIONAL EXPERIENCE

Dalton & Associates, PA, Wilmington, DE — May 2022-Present

Law Clerk. Draft briefs in opposition to motions for summary judgment and accompanying exhibit list. Produce deposition digests and research memoranda. Verify legal citations and proofread legal documents for errors. Focus on personal injury suits and asbestos litigation.

Veterans Law Clinic, Wilmington, DE — January 2023-May 2023

Certified Legal Intern. Provided free legal representation to primarily low-income and disabled veterans. Worked with supervising attorney to appeal adverse VA decisions. Communicated to clients the status of their case and answered questions. Drafted estate planning documents including wills, health care directives, and powers of attorney.

Widener University Delaware Law School, Wilmington, DE — September 2022-December 2022

Teaching Assistant. Provided supplemental instruction to first-year students in Legal Methods I, Widener's first-year legal writing course. Conducted legal research for use in class assignments. Held workshops and office hours for students to review and improve their legal writing, analysis, and research skills.

Carr Law, LLC, Newark, DE — May 2019-May 2022

Legal Assistant. Worked alongside supervising attorney to prepare estate planning documents including wills, health care directives, powers of attorney, and trust agreements. Prepared deed transfers. Maintained supervising attorney's schedule and organized client files.

Young Conaway Stargatt & Taylor, Wilmington, DE — May 2018-August 2018

Records Management Intern. Supported administrative staff in managing records. Organized, maintained, and updated existing records. Scanned and filed documents.

06/12/23 Widener University Page 1 of 1

Ms. Ashley C. Curran

402 Uxbridge Way
Hockessin, DE 19707

Ms. Ashley C. Curran

SSN: *** ** 2294
Major: LAW REGULAR DIVISION - DE

Course	Title	Grade	Hrs Att	Hrs Cmpt	Hrs to Calc	Qual Points	
LAWD-518	TORTS I	A-	4.00	4.00	4.00	14.8	
LAWD-515	PROPERTY I	B	4.00	4.00	4.00	12.0	
LAWD-508	CONTRACTS I	B-	4.00	4.00	4.00	10.8	
LAWD-509	LEGAL METHODS I/ANALYSI	A	3.00	3.00	3.00	12.0	
LAWD-6092	APPLIED LEARNING LAB	P	1.00	1.00	0.00	0.0	
	21/FA Term Totals:		16.00	16.00	15.00	49.6	GPA = 3.307
	Cumulative Totals:		16.00	16.00	15.00	49.6	GPA = 3.307
	Academic Standing for 21/FA: Dean's Honors						
LAWD-510	LEGAL METHODS II	A	2.50	2.50	2.50	10.0	
LAWD-505	CRIMINAL LAW	B-	3.00	3.00	3.00	8.1	
LAWD-516	PROPERTY II	A-	2.50	2.50	2.50	9.3	
LAWD-502	CIVIL PROCEDURE I	B-	4.00	4.00	4.00	10.8	
LAWD-6171	TORTS II	B+	2.00	2.00	2.00	6.6	
LAWD-6170	CONSTITUTIONAL LAW I	B	2.00	2.00	2.00	6.0	
	22/SP Term Totals:		16.00	16.00	16.00	50.8	GPA = 3.172
	Cumulative Totals:		32.00	32.00	31.00	100.4	GPA = 3.237
	Academic Standing for 22/SP: Dean's Honors						
LAWD-836	EVIDENCE	A	4.00	4.00	4.00	16.0	
LAWD-6172	CONST LAW II:STRUCTURE/	B	4.00	4.00	4.00	12.0	
LAWD-6179	CIVIL PROCEDURE II	B	2.00	2.00	2.00	6.0	
LAWD-512	LEGAL METHODS III	B+	2.00	2.00	2.00	6.6	
LAWD-702	PROFESSIONAL RESPONSIBI	B	3.00	3.00	3.00	9.0	
	22/FA Term Totals:		15.00	15.00	15.00	49.6	GPA = 3.307
	Cumulative Totals:		47.00	47.00	46.00	150.0	GPA = 3.260
LAWD-506	CRIM PRO I: INVESTIGATI	A-	3.00	3.00	3.00	11.1	
LAWD-600	SECURED TRANSACTIONS	A-	2.00	2.00	2.00	7.4	
LAWD-6168	CONTRACTS II	B	4.00	4.00	4.00	12.0	
LAWD-912	VETERANS' LAW CLINIC	A-	4.00	4.00	4.00	14.8	
	23/SP Term Totals:		13.00	13.00	13.00	45.3	GPA = 3.485
	Cumulative Totals:		60.00	60.00	59.00	195.3	GPA = 3.309

End of Grading Information

END OF DOCUMENT

Widener University

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to enthusiastically recommend Ashley Curran for a clerkship. Ashley was a student in my Legal Methods I and II classes during the 2022-2023 academic year and also worked as my Teaching Assistant during Fall 2022. She stands out from the thousands of law students I have taught during my career because of her professionalism, pleasant personality, intellectual acumen, and writing skills. I enjoyed working closely with her as my TA, and my students benefitted from her wisdom and compassion.

Throughout the time I have known her, Ashley has repeatedly demonstrated her professionalism, careful preparation for class, and excellent work habits. She has impressed me by asking thoughtful questions, seeking out one-on-one help when she needed it, and consistently drafting well-written assignments. Because I have witnessed her growth and consistent performance over the course of three semesters, I am able to attest to her perseverance and professionalism over the long term.

Ashley is a very talented writer, and both her skill and her commitment to improvement have stood out in the classes she has taken with me. She frequently participated in class and met with me during office hours, so I have gotten to know her well. As my TA, she taught workshops to my classes, held office hours, and collaborated with my other TA to assist first-year law students. I have no hesitations in recommending her.

Please contact me with questions. I can be reached at nemillar@widener.edu or #(404) 386-0333.

Best,

/s/ Nyla E. Millar

Nancy (Nyla) E. Millar
Assistant Professor of Law
Widener University Delaware Law School

Widener University
Delaware Law School

June 1, 2023

To Whom It May Concern:

I had the pleasure of supervising Ashley Curran from January to May 2023 in my capacity as an Assistant Professor of Law and Director of the Veterans Law Clinic, where Ashley served as a student intern.

I have been supervising students at the Clinic since January 2012, and I count Ashley as a standout. During Ashley's time at our Clinic, I learned that she is remarkably professional and competent. Ashley was assigned to a number of cases—one of which was quite complex and presented a tight deadline—and she handled them with ease. Any judge, organization, or law firm would be fortunate to hire someone so dedicated and attuned to the most nuanced of factual and legal issues.

Ashley possesses other qualities which I believe lend to her success. She is incredibly conscientious, manages her time effectively, and has the ability to think creatively. With regard to Ashley's character, I consider her an honest, forthright, and ethical individual. At the Veterans Law Clinic, we represent a largely vulnerable population—disabled and indigent veterans. Ashley was entrusted to interact with my clients, and I believe that my clients respected and trusted her in return. Ashley easily interacts with fellow students and staff members, as well, and is calm under pressure.

I recommend Ashley without reservation. Please feel free to contact me if you need any further information. I can be reached at 302-477-2116 or jrmorrell@widener.edu.

Sincerely,

/s/ Jennifer R. Morrell

Jennifer R. Morrell
Assistant Professor of Law
Director, Veterans Law Clinic

VALERIE M. CARR, ESQUIRE
VCARR@CARRLAWDE.COM

CARR LAW LLC

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WWW.CARRLAWDE.COM

June 15, 2023

The Honorable Juan Sanchez
United States District Court for the
Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

RE: Ashley Curran

Your Honor:

It is with immense pleasure and enthusiasm that I recommend Ashley Curran for a clerkship opportunity with Your Honor. I have had the pleasure of knowing Ms. Curran since she started working for my office in May of 2019. She came to me having just completed her sophomore year of college, with little administrative or legal experience, but a genuine desire to immerse herself in this environment. She was the first person many of my clients met when entering the office and her friendly personality and professionalism made them feel welcome and comfortable – an asset that anyone in a service-related industry can appreciate. Ashley immediately impressed me with her thoroughness, attention to detail, and willingness to ask questions when instructions or expectations were not clear, but also when her hunger for additional education showed through. The ease with which she grasped estate planning concepts and used that knowledge to integrate the appropriate information into draft documents leads me to believe she will excel in any legal environment.

Although she left my office last summer to begin an internship with another law firm, we have continued to keep in touch. She has masterfully juggled a vigorous course study while working part-time, working in her law school legal clinic, and contributing to Law Review. She periodically asks for guidance on the future of her law career, demonstrating the seriousness in which she takes her career path and the willingness to listen to constructive feedback, character traits that seem to be in short supply these days. While I have missed her and her work ethic around the office (and have been secretly hoping she would return to my office after graduation), I hope you will seriously consider her for a clerkship opportunity in your chambers. You will not be disappointed, and I trust she will impress you much the same she did with me.

Respectfully submitted,

/s/ Valerie M. Carr

Valerie M. Carr, Esq.

Ashley Curran Writing Sample

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

LEE CRUMPLER, M.D.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Civil Action No. 22-647**
	:	
JESSE BOOT,	:	
	:	
Defendant.	:	

JESSE BOOT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Defendant, Jesse Boot, by and through her counsel, Ashley Curran, and hereby moves this Honorable Court for Summary Judgment on the following grounds:

1. Under Federal Rule of Civil Procedure 56, summary judgment is appropriate in favor of the movant when there is no genuine issue as to any material fact, and thus the movant is entitled to judgment as a matter of law.
2. Plaintiff cannot establish the requisite publicity required under Pennsylvania law for a false light invasion of privacy claim.
3. Plaintiff cannot establish through "clear and convincing" evidence that Jesse Boot posted on Reddit in a reckless disregard as to the falsity of the warning.

WHEREFORE, Defendant respectfully requests this Honorable Court grant summary judgment in her favor and against Plaintiff, Lee Crumpler.

Ashley Curran
Legal Methods III, Section A3
November 23, 2022

ATTORNEY FOR DEFENDANT

Ashley Curran Writing Sample

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

LEE CRUMPLER, M.D.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Civil Action No. 22-647**
	:	
JESSE BOOT,	:	
	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF JESSE BOOT

Ashley Curran
Legal Methods III, Section A3
November 23, 2022

ATTORNEY FOR DEFENDANT

Ashley Curran Writing Sample

INTRODUCTION

Jesse Boot ("Boot") moves this Honorable Court, pursuant to Federal Rule of Civil Procedure 56, for summary judgment in her favor and against Lee Crumpler, M.D. ("Plaintiff") as to all her claims. Considering Boot's education, experience, and past instances of correctly identifying suspicious prescriptions, combined with the strict, new abortion law in Ohio, she refused to refill a young woman's methotrexate prescription that Plaintiff prescribed. Since methotrexate can act as an abortifacient, and because Boot coincidentally saw an influx in methotrexate prescriptions from Plaintiff after Ohio's abortion law passed, Boot became suspicious. She decided the best way to get out a warning was on a Reddit forum for pharmacists in her area. Boot posted on August 3, 2022, and on August 19, 2022, opposing counsel sent her a demand letter to remove the warning. Boot received the letter on August 24, 2022, and she immediately removed her post and the comments. Plaintiff then commenced this action for false light against Boot on September 3, 2022; however, since Plaintiff cannot establish the essential elements of her claim under Pennsylvania law, Boot asks this Court to grant her motion for summary judgment against Plaintiff.

STATEMENT OF FACTS

Upon her graduation from pharmaceutical school in 2019, Jesse Boot began her career at Greenwall Pharmacy ("Greenwall") located in Sharon, Pennsylvania. (R. at 9.) Since Greenwall is on the border of Pennsylvania and Ohio, Boot fills many Ohio prescriptions. (R. at 10.) Recently, Ohio passed a new abortion law that could hold pharmacists criminally liable for filling abortifacient prescriptions. (R. at 10.) With the new law in mind, Boot denied Anamaria Valdez's ("Valdez") prescription for methotrexate on August 2, 2022. (Compl. ¶ 9; R. at 11.) Plaintiff prescribed the methotrexate to Valdez. (R. at 11-12.)

Valdez, a woman of childbearing age, appeared nervous to Boot when she tried to fill her prescription. (R. at 11.) Boot tried to confirm if Valdez was or could be pregnant, but Valdez only appeared more nervous. (R. at 11.) Under the new abortion law, Boot could be criminally liable for filling the prescription even if Valdez did not know she was pregnant. (R. at 11.) Considering the circumstances, Boot refused to fill Valdez's prescription. (R. at 11.) After Boot refused, Valdez would not take "no" for an answer. (R. at 11.) Boot described Valdez's demeanor as "desperate[] the way someone would be if they were pregnant and needed or wanted to terminate the pregnancy[,]" which confirmed Boot's suspicions. (R. at 11.) Boot then realized she saw an influx in methotrexate prescriptions from Plaintiff since Ohio's new abortion law passed (R. at 11-12.)

This instance was not the first time Boot declined to fill a prescription. (R. at 18.) Typically, Boot uses her professional judgment when she denies a prescription. (R. at 18.) For example, Boot once received a forged prescription for oxycontin. (R. at 19.) Her judgment was right, and she did not fill it. (R. at 19.) Boot also called local prescribing doctors to confirm suspicious prescriptions before; however, Boot did not call Plaintiff because she was "too scared of Ohio laws to have anything to do with [Plaintiff]." (R. at 18, 20.) Instead, Boot believed the post on Reddit "would be the best and easiest way to get the word of warning out to the pharmacy professionals . . . ." (R. at 12.) Reddit is "essentially a giant online forum that is broken up into lots of smaller forums[,]" called "subreddits." (R. at 28.) The members of the subreddit Boot posted in were mainly pharmacists in "Eastern Ohio, Northern West Virginia, Maryland, and Western Pennsylvania." (R. at 12.) Boot chose this subreddit because "[Plaintiff] likely had patients filling prescriptions in this region and [she] wanted to warn pharmacists . . . ." (R. at 12.)

In the post, Boot warned that a "Dr. Crumpler in Eastern Ohio" wrote many methotrexate prescriptions, arousing her suspicion considering the new Ohio abortion law. (Ex. 1.) Boot

therefore opined that pharmacists in the region should "avoid liability" and not fill Plaintiff's scrips because it "seemed suspicious." (Ex. 1). Three users commented on the post (besides Boot); their usernames were "Pharmaguy," "MedsRMe," and "ForAllLife." (Ex. 1.) Additionally, Boot replied to a comment on her post that asked her to elaborate more. (Ex. 1.) She then discussed the "strong feeling" she had about Plaintiff prescribing methotrexate to "help patients get around Ohio law." (Ex. 1.) Additionally, the post had four comments (including Boot's reply) and 100% "upvotes." (Ex. 1.) However, it is unknown how many pharmacists are in the subreddit, and it is impossible to tell how many people viewed Boot's post, as Plaintiff's expert witness, Dr. Marcia McLuhan ("Dr. McLuhan"), testified. (R. at 12, 28-29.)

PROCEDURAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment in favor of the movant is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact[,]" and thus, "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). While the court must draw "[a]ll inferences . . . in the light most favorable to the nonmoving party[,]" the nonmoving party must show more than a "mere scintilla" of evidence to overcome summary judgment. *Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 467 (E.D. Pa. 2010) (citing *Pa. Prot. & Advoc., Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 379 (3d Cir. 2005); *Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001)). The existence of disputed facts therefore "is insufficient to defeat a motion for summary judgment . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (holding that the substantive law will govern which facts are material).

Further, there is a "genuine" dispute when the evidence "would allow a reasonable fact finder to return a verdict in favor of the non-moving party." *Id.* at 248. The moving party bears the

initial burden of showing there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A court only needs to consider the cited materials, "but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). If the non-moving party presents facts that are "merely colorable" or "not significantly probative" then "summary judgment may be granted." *Anderson*, 477 U.S. at 250.

ARGUMENT

This Court should grant summary judgment in favor of Jesse Boot because Plaintiff fails to establish the essential elements of her false light claim. Pennsylvania adopts the Restatement (Second) of Torts's definition of false light, requiring a plaintiff to show that "the false light in which the other was placed would be highly offensive to a reasonable person, and the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Larsen v. Philadelphia Newspapers, Inc.*, 543 A.2d 1181, 1188 (Pa. Super. Ct. 1988) (citing RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977). Offensiveness is not at issue; thus, this motion will first address how Plaintiff cannot establish the essential element of publicity. Second, it will explain how Plaintiff cannot meet her "clear and convincing" burden to show Boot acted recklessly.

I. THIS COURT SHOULD FIND PLAINTIFF CANNOT ESTABLISH PUBLICITY BECAUSE BOOT WARNED PHARMACISTS WITH AN INTEREST IN HER POST AND THERE IS NO FACTUAL DISPUTE REGARDING VIEWERSHIP.

The element of publicity "does not include notifying those who have an interest in the [publicized] matter." *Schatzberg v. State Farm Mut. Auto. Ins. Co.* 877 F. Supp. 2d 232, 245 (E.D. Pa. 2012) (citing *Strickland v. Univ. of Scranton*, 700 A.2d 979, 987 (Pa. Super. Ct. 1997)). Instead, publicity requires "'the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public

knowledge.'" *Curran v. Child.'s Serv. Ctr. of Wyoming Cnty., Inc.*, 578 A.2d 8, 12 (Pa. Super. Ct. 1990) (quoting RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a.). Vague allegations as to the viewership of a publication are notably insufficient to establish the requisite "publicity" in a false light claim. *Schatzberg*, 877 F. Supp. 2d at 246.

Dissemination of information to those with an interest in the communication "is a far cry from the publicity necessary to establish a false light invasion of privacy claim." *Id.* at 246. In *Schatzberg*, the plaintiff, a doctor, billed his patient's treatment to the defendant, an insurance company. *Id.* at 238. To reduce fraudulent insurance claims, the defendant implemented a program "to pursue the doctors who treat injuries [to perpetuate] fraud." *Id.* at 239. The defendant then contacted the plaintiff's former and current employees, as well as a former patient and his attorney to tell them the plaintiff's claims and billing practices were under investigation. *Id.* at 240. The plaintiff initiated a false light claim and alleged that the defendant "spread false information about [the plaintiff] to individuals in the medical and legal communities . . . ." *Id.* at 245. The court reasoned the communications were sent to individuals with an interest in them and thus were insufficient to establish publicity. *Id.* at 246.

Issues of material fact regarding publication will "preclude the entry of summary judgment for either party." *Eck v. Oley Valley Sch. Dist.*, 431 F. Supp. 3d 607, 635 (E.D. Pa. 2019). In *Eck*, the defendants, members of a school district, sent out an email about one of the plaintiffs, a student. *Id.* The student claimed the email cast him in a false light. *Id.* The defense argued the email was only sent to a "handful" of people, and so there was no publicity. *Id.* In support, the defense pointed "to a list of nineteen [email] addresses" emailed. *Id.* However, the student requested an original copy of the defendant's email, including a list of recipients, which the defendant never produced.

Id. This created a fact issue about who received the email, and thus the court denied the defendant's motion for summary judgment. *Id.*

Boot's case is like *Schatzberg* because the publicized content in both instances notified those with an interest in the matter. In *Schatzberg*, the defendant informed the plaintiff's former and current employees, and a former patient about a fraud investigation into the plaintiff's claims. The letter concerned a claim for payment of the plaintiff's medical bills that were under investigation. Here, Boot notified the pharmacists from her surrounding area via Reddit about potential, and probable, criminal liability. From the usernames of the commentors, it is inferable that they have an interest in either pharmacy, medicine, or the pro-life movement. Boot even testified she chose that particular Reddit forum because it was likely some of the pharmacists in the group fill Plaintiff's prescriptions. (*See* Ex. 1). The court in *Schatzberg* reasoned the former patient and his attorney had an interest in the publicized matter, and therefore the letters did not constitute publicity. This reasoning applies here because if Boot, or another pharmacist, filled a prescription that could be used as an abortifacient in a state where abortion is illegal, they could face criminal prosecution and lose their license to practice. With such high stakes, the pharmacists in the Reddit group certainly had an interest in the matter, as demonstrated by the commenter's usernames. This Court should therefore find that the pharmacists in the Reddit group had an interest in Boot's post, and there is no "publicity" for false light purposes.

Conversely, Boot's case is distinguishable from *Eck* because in *Eck* there was a question of exactly who received the defendant's email. Here, there is no genuine issue of material fact regarding who viewed Boot's post because it is impossible to retrieve the viewership statistics, as confirmed by Plaintiff's expert witness. (R. at 29.) The court in *Eck* reasoned since there was a factual issue about how many people received the email, summary judgment was inappropriate.

This reasoning applies here because, unlike *Eck*, there is no factual dispute regarding how many people saw Boot's post; it is undisputed the viewership statistics are untraceable. Even though Dr. McLuhan theorized "many viewers" could have seen the post, it will never be certain. (R. at 29.) Even though there were three commentors and 100% of upvotes on the post, it is still impossible to determine the number of views the post had, or how many people upvoted it in total. (Ex. 1.) While Plaintiff may argue that hundreds of people could use the Reddit group, the exact number of viewers cannot and will never be ascertained. Thus, there is no issue of material fact and summary judgment is appropriate.

Plaintiff fails to meet the "publicity" standard required for a false light invasion of privacy claim. Because Boot posted to a group of pharmacists with an interest in her warning, and it is impossible to know how many views the post had, Plaintiff fails to establish the essential element of publicity and summary judgment is appropriate in favor of Boot.

II. THIS COURT SHOULD FIND THAT PLAINTIFF CANNOT MEET THE "CLEAR AND CONVINCING" STANDARD FOR ESTABLISHING RECKLESSNESS.

Like defamation, "the elements of a claim for false light include knowledge of, or reckless disregard for, the falsity of a publication[.]" *Coleman v. Ogden Newspapers, Inc.*, 142 A.3d 898, 905 (Pa. Super. Ct. 2016) (*see also Krajewski v. Gusoff*, 53 A.3d 793, 809 (Pa. Super. Ct. 2012) (applying facts from a defamation claim in the false-light context)). To establish recklessness, a plaintiff must prove through "clear and convincing evidence the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 909 (citing *Manning v. WPXI, Inc.*, 886 A.2d 1137, 1144 (Pa. Super. Ct. 2005). Conversely, where a defendant bases his publication on information he "reasonably believe[s] [is] accurate[,]" a plaintiff cannot establish recklessness. *Id.* (citing *Curran v. Philadelphia Newspapers, Inc.*, 439 A.2d 652, 660 (Pa. 1981). Thus, "[i]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or

surmise, rather than claiming to [have] objectively verifiable facts, the statement is not actionable." *McCafferty v. Newsweek Media Grp., Ltd.*, 955 F.3d 352, 359 (3d Cir. 2020) (citing *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)).

Information from a reputable source is "reasonably believable" and does not satisfy the "clear and convincing" standard for recklessness. *Coleman*, 142 A.3d at 910. In *Coleman*, the defendant, a newspaper, republished stories about the plaintiff, a former county commissioner, and used a government report as its source. *Id.* at 903, 907. The defendant continuously republished stories about the plaintiff, even though it knew the stories were false. *Id.* The plaintiff sued for defamation and false light, but the appellate court granted summary judgment in favor of the defendant. *Id.* at 898, 909. The court reasoned the plaintiff failed to show through clear and convincing evidence the defendants "entertained serious doubts as to the truth of [its] publication[s]" since the government report was a reliable source. *Id.*

Expressing one's "subjective view" or "interpretation" of an event in a publication is nonactionable in a false light claim. *McCafferty*, 955 F.3d at 359. In *McCafferty*, the appellant published an article about the appellee, a minor and well-known Donald Trump supporter. The article criticized the "hard right" for using children as their spokespeople and named the appellee throughout. *Id.* at 352, 356. The court held "[t]he First Amendment protects even the most derogatory opinions," and thus, "as long as the opinion relies on disclosed facts, it is privileged." *Id.* at 360. There was also a defamation claim, where the court ruled a statement is nonactionable if the speaker merely expressed his or her "subjective view" or "interpretation." *Id* at 359. The appellate court granted summary judgment in favor of the defendant on both claims. *Id.*

Like in *Coleman*, where the plaintiff failed to meet his burden, Plaintiff here fails to meet the "clear and convincing" standard for a showing of recklessness because Boot reasonably

believed her warning was accurate. Unlike *Coleman*, Boot did not republish any materials, but she based her post on her subjective view of events she witnessed. The influx of methotrexate prescriptions prescribed by Plaintiff, combined with Valdez's nervous demeanor gave Boot a "bad gut feeling." (R. at 11.) Boot confirmed her suspicions when she asked Valdez if she was or could be pregnant, and Valdez only appeared to get more nervous. Although the defendant in *Coleman* knew the stories were false, the court held that its source was reliable and thus, there was no showing of recklessness. Based on Boot's past experiences, where she correctly identified mistaken/fraudulent prescriptions, Boot believed this instance was no different. Therefore, she trusted her gut, did not fill Valdez's prescription, and warned local pharmacists about potential criminal liability.

Plaintiff may argue Boot should have called her to confirm the prescription, as Boot did in the past for other doctors. First, Boot has no professional duty to extend this courtesy, as she may use her professional judgment as she sees fit. Second, Boot did not know Plaintiff because she is not a local doctor. The doctors Boot previously called about suspicious prescriptions were local doctors she knew. Third, even if Boot called Plaintiff, it is highly unlikely she would admit to prescribing methotrexate as an abortifacient considering the criminal liability concerning Boot herself. Boot was merely trying to follow the law and help other pharmacists avoid liability—something she should not be punished for. Therefore, the reasoning from *Coleman* should apply here because the new abortion law, the influx in methotrexate prescriptions from Plaintiff, and Valdez's desperation led Boot to reasonably believe her warning on Reddit was accurate.

Additionally, Boot's case is like *McCafferty* because both the magazine and Boot's warning expressed a subjective view/opinion. In *McCafferty*, the appellee's publication was nonactionable because it was an opinion based on disclosed facts. Although Boot did not base her

warning on disclosed facts, but on an event she witnessed, the same principle should apply: the First Amendment protects even derogatory opinions and posting a subjective view or interpretation of an event is nonactionable. Here, Boot posted Plaintiff wrote "a lot of methotrexate scrips" which "seem[ed] suspicious" considering the new abortion law, and the medication's use as an abortifacient. (Ex. 1.) Further, Boot said she "ha[d] a strong feeling" Plaintiff prescribed methotrexate to get around Ohio's abortion law. (Ex. 1.) The court in *McCafferty* held the First Amendment protects even derogatory opinions. This reasoning applies to Boot because her post contained her opinion, based on her subjective view or interpretation of events she perceived. Further, it would violate the First Amendment and the sentiments of freedom of speech that are so fundamental to this country. If this Court does not protect Boot's opinion, it would not only violate the First Amendment, but it would undermine the great freedoms of the press. Thus, under *McCafferty*, Boot's post contained her opinion, which is protected speech.

Because Boot reasonably believed her post was accurate and merely offered her opinion based on an encounter she had with Plaintiff's patient, which is protected, Plaintiff cannot establish through "clear and convincing" evidence Boot doubted the truthfulness of her post.

CONCLUSION

Jesse Boot respectfully requests this Court grant summary judgment in her favor. Because Boot posted her warning to pharmacists with an interest in the warning, and there is no factual dispute about who viewed her warning on Reddit, Plaintiff fails to establish the essential element of publicity. Further, Boot reasonably believed her warning was accurate and she posted the warning based on her subjective view or opinion of an event she witnessed. Thus, Jesse Boot is entitled to judgment as a matter of law.

Ashley Curran Writing Sample

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

LEE CRUMPLER, M.D.,	:	
Plaintiff,	:	
	:	**Civil Action No. 22-647**
v.	:	
	:	
JESSE BOOT,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this day of 2022, upon consideration of Defendant, Jesse Boot's Motion for Summary Judgment, and any response thereto, it is hereby ORDERED that the motion is GRANTED. Summary Judgment is entered in favor of the Defendant and against the Plaintiff.

_____

J.

Ashley Curran Writing Sample

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

LEE CRUMPLER, M.D.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Civil Action No. 22-647**
	:	
JESSE BOOT,	:	
	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I, Ashley Curran, hereby certify this 23rd day of November 2022, the within Motion for Summary Judgment and Memorandum of Law in Support of Summary Judgment was caused to be served upon the following:

By Electronic Mail and U.S. Mail

wliu@gmail.com
Wendy Liu
Attorney for Plaintiff
1212 Butler Boulevard
Youngstown, OH 44501

Ashley Curran
Legal Methods III, Section A3
November 23, 2022

ATTORNEY FOR DEFENDANT

Ashley Curran Writing Sample

I, Ashley Curran, hereby certify that this assignment contains 15 pages and does not exceed the 12-page limitation for this assignment.

HONOR CODE

On my honor, I submit this work in good faith and pledge that I have neither given nor received improper aid in its completion. I further acknowledge I am required to report any apparent Honor Code violation that I witness.

/s/ ***Ashley Curran*** November 23, 2022

Applicant Details

First Name	**Cassandra**
Last Name	**D'Alesandro**
Citizenship Status	**U. S. Citizen**
Email Address	**caranzad@umich.edu**
Address	**Address** Street **1510 Lexington Ave Apt 11N** City **New York** State/Territory **New York** Zip **10029** Country **United States**
Contact Phone Number	**7273668666**

Applicant Education

BA/BS From	**University of South Florida**
Date of BA/BS	**June 2017**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 6, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Journal of Gender & Law** **Michigan Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Henry M. Campbell Moot Court Competition**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Primus, Richard
raprimus@umich.edu
734-647-5543
Salinas, Melissa
salinasm@umich.edu
734-763-4319

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a 2021 graduate of the University of Michigan Law School and I am writing to apply for a clerkship in your chambers for the 2024-2025 term.

I have attached my resume, law school transcript, and a writing sample for your review. Letters of recommendation from the following professors are also attached:

Professor Richard Primus, raprimus@umich.edu, (734) 647-5543
Professor Melissa Salinas, msalinas@umich.edu, (734) 764-6472

Thank you for your time and consideration.

Respectfully,

Cassandra D'Alesandro

Cassandra D'Alesandro

1510 Lexington Ave #11N New York, NY 10029
727-366-8666 • caranzad@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor GPA 3.574 — May 2021
Journal: *Michigan Law Review*, Executive Editor
Michigan Journal of Gender & Law, Associate Editor
Activities: '20-21 Henry M. Campbell Moot Court, Competitor
1L Oral Advocacy Competition, Judge
First Generation Law Students, Member
Catholic Law Students Association, Member
MILVETS, Member

UNIVERSITY OF SOUTH FLORIDA — Tampa, FL
Bachelor of Arts in International Studies — May 2017

EXPERIENCE

WEIL, GOTSHAL & MANGES — New York, NY
Associate, Securities Litigation — October 2021 – Present
Summer Associate — June 2020 – August 2020

- Assisted with drafting motions to dismiss and motions to compel.
- Performed and summarized research on various securities and corporate governance topics, including a novel application of the Delaware reporter's shield statute.
- Participated in various aspects of discovery including document review and production.
- Prepared outlines for depositions.

Pro Bono Litigation

- Drafted sections of complaint and brief in support of preliminary injunction.
- Drafted sections of federal habeas petition.
- Evaluated case files for the Innocence Project.

FEDERAL APPELLATE LITIGATION CLINIC — Ann Arbor, MI
Student Attorney — September 2020 – May 2021

- Authored opening and reply briefs that were filed in the U.S. Court of Appeals for the Sixth Circuit.
- Prepared colleagues for oral argument.

U.S. ATTORNEY'S OFFICE FOR THE MIDDLE DISTRICT OF FLORIDA — Tampa, FL
Appellate Division Intern — June 2019 – August 2019

- Researched and drafted sections of appellate briefs.

UNITED STATES NAVY — San Diego, CA
Petty Officer Second Class — January 2010 – January 2015

- Repaired mission critical equipment.
- Traveled throughout the US, the Middle East, Europe, and Africa.

BAR ADMISSION

Admitted to practice in New York (2022)

INTERESTS

Broadway Shows | Walks in Central Park | Matt Levine's Money Stuff | Disney World Vacations | House Plants

Control No: E183978501 Issue Date: 06/07/2021 Page 1

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Dalesandro,Cassandra Ann
Student#: 41165134

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Transfer course credit accepted toward a law degree.								
			Florida State University				30.00	
Cumulative Total							**30.00**	
Fall 2019			**(September 03, 2019 To December 20, 2019)**					
LAW	637	001	Bankruptcy	John Pottow	4.00	4.00	4.00	B+
LAW	641	001	Crim Just: Invest&Police Prac	Eve Primus	4.00	4.00	4.00	B+
LAW	657	002	Enterprise Organization	Nicholas Howson	4.00	4.00	4.00	B+
Term Total				**GPA: 3.300**	**12.00**	**12.00**	**12.00**	
Cumulative Total				**GPA: 3.300**		**12.00**	**42.00**	
Winter 2020			**(January 15, 2020 To May 07, 2020)**					
During this term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, honors were not awarded for 1L Legal Practice.								
LAW	653	001	Employment Discrimination	Ellen Katz Sarah Prescott	4.00		4.00	PS
LAW	675	001	Federal Antitrust	Daniel Crane	3.00		3.00	PS
LAW	677	001	Federal Courts	Raymond Kethledge	3.00		3.00	PS
LAW	681	001	First Amendment	Don Herzog	4.00		4.00	PS
Term Total					**14.00**		**14.00**	
Cumulative Total				**GPA: 3.300**		**12.00**	**56.00**	

Continued next page >

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Control No: E183978501 Issue Date: 06/07/2021 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Dalesandro,Cassandra Ann
Student#: 41165134

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020		**(August 31, 2020 To December 14, 2020)**						
LAW	648	001	Advanced Constitutional Interp	Richard Primus	4.00	4.00	4.00	A-
LAW	790	001	Early Amer Legal History	William Novak	3.00		3.00	P
LAW	797	001	Model Rules and Beyond	Bob Hirshon	3.00	3.00	3.00	A-
LAW	972	001	Federal Appel Litig Clnc I	Melissa Salinas	5.00	5.00	5.00	A
Term Total				**GPA: 3.825**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.562**		**24.00**	**71.00**	
Winter 2021		**(January 19, 2021 To May 06, 2021)**						
LAW	606	801	Transnational Law	Mathias Reimann	3.00	3.00	3.00	B+
LAW	669	001	Evidence	Eve Primus	4.00	4.00	4.00	B+
LAW	730	001	Appellate Advoc:Skills & Pract	Evan Caminker	4.00	4.00	4.00	A-
LAW	973	001	Federal Appel Litig Clnc II	Melissa Salinas	4.00	4.00	2.00	A
Term Total				**GPA: 3.593**	**15.00**	**15.00**	**13.00**	
Cumulative Total				**GPA: 3.574**		**39.00**	**84.00**	

End of Transcript
Total Number of Pages 2

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

Florida State University
Office of the Registrar
282 Champions Way
PO Box 3062480
Tallahassee, Florida 32306-2480

Name: **Cassandra D Aranzado**
Student ID: 200554034
Birthdate: 04/25/XXXX
Residency: Florida Resident (USA)
Print Date: 6/29/2021

Unofficial Transcript

ALL CREDIT HOURS ON THIS RECORD REFLECTED IN SEMESTER HOURS
May not be released to a third party without permission

Beginning of Law Record

2018 Fall

Program: Law
Plan: Law Major

Course	Description	Grd	GB	RP	Taken	Passed	Points
LAW5300	CIVIL PROCEDURE	A-	LWG		4.000	4.000	15.000
LAW5400	PROPERTY	A	LWG		4.000	4.000	16.000
LAW5700	TORTS	A-	LWG		4.000	4.000	15.000
LAW5792	LEGAL WRTNG & RSCH I	A	LWG		2.000	2.000	8.000

			Taken	Passed	GPA Hrs	Points
Term GPA	3.857	Term Totals	14.000	14.000	14.000	54.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.857	Comb Totals	14.000	14.000	14.000	54.000
Cum GPA	3.857	Cum Totals	14.000	14.000	14.000	54.000
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.857	Comb Totals	14.000	14.000	14.000	54.000

Term Honor: DEAN'S LIST

2019 Spring

Program: Law
Plan: Law Major

Course	Description	Grd	GB	RP	Taken	Passed	Points
LAW5000	CONTRACTS	A	LWG		4.000	4.000	16.000
LAW5100	CRIMINAL LAW	A-	LWG		3.000	3.000	11.250
LAW5501	CONSTITUTIONAL LAW I	A	LWG		3.000	3.000	12.000
LAW5522	LEGISLATION AND REGULATION	A	LWG		3.000	3.000	12.000
LAW5793	LEGAL WRITNG/RECH II	B+	LWG		3.000	3.000	9.750

			Taken	Passed	GPA Hrs	Points
Term GPA	3.813	Term Totals	16.000	16.000	16.000	61.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.813	Comb Totals	16.000	16.000	16.000	61.000
Cum GPA	3.833	Cum Totals	30.000	30.000	30.000	115.000
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.833	Comb Totals	30.000	30.000	30.000	115.000

Term Honor: DEAN'S LIST

Law Career Totals

			Taken	Passed	GPA Hrs	Points
Cum GPA:	3.833	Cum Totals	30.000	30.000	30.000	115.000
Trans Cum GPA		Trans Totals	0.000	0.000	0.000	0.000
Comb Cum GPA	3.833	Comb Totals	30.000	30.000	30.000	115.000

End of Law

End of Academic Transcript

MICHIGAN LAW
UNIVERSITY OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Casey D'Alesandro has applied to be a law clerk in your chambers. I am happy to write in her support.

In the fall of 2020, Casey was enrolled in a small and challenging course in constitutional interpretation, and that's where I got to know her. The course used both primary and secondary material to examine problems at the cutting edge of constitutional interpretation, both by examining leading theories on their own terms and by seeing how those theories played out when confronted with the messy realities of the law in practice. It was a demanding course, and Casey handled it impressively. She was reliably serious, thoughtful, and inquisitive, ready to test out ideas and think critically about them. I think that the A-minus she earned on the exam accurately reflects her performance in the course.

I also found Casey to be a particularly mature law student. Many law students don't yet know much of the world outside of educational institutions, and many law students who are attracted to courses in things like constitutional interpretation are inclined toward abstractions or, worse, inclined to be a bit glib about passing judgment on big issues of the day. Casey is none of those things. She's quietly serious and well-grounded. (I believe she's a Navy veteran, which may or may not have something to do with this aspect of her presentation.)

I think of Casey as someone who will rise to challenges. I am happy to recommend her.

Sincerely,

Richard Primus
Theodore J. St. Antoine Collegiate Professor of Law

Richard Primus - raprimus@umich.edu - 734-647-5543

MICHIGAN LAW
FEDERAL APPELLATE LITIGATION CLINIC
UNIVERSITY OF MICHIGAN

Melissa M. Salinas, Esq. • Director, Adjunct Assistant Clinical Professor

Dear Judge:

I am honored to recommend Casey D'Alesandro for a judicial clerkship. I taught and directly supervised Casey for two academic semesters—from September 2020 through May 2021—in the University of Michigan Law School's Federal Appellate Litigation Clinic. I had an excellent vantage point to see Casey's writing in the context of complex legal matters. She is a thoughtful, intelligent individual who has excellent research, writing, and analytical skills. I am confident she will be an outstanding law clerk.

I directly supervised Casey's work on three cases. Casey's main assignment was a federal criminal direct appeal, where she represented an indigent appellant in the United States Court of Appeals for the Sixth Circuit. In this appeal, Casey briefed two arguments including a Fourth Amendment search and seizure issue and a sufficiency-of-the-evidence issue. The case was complex, involving contested pretrial motions, a jury trial, and sentencing disputes.

With respect to the Fourth Amendment issue, Casey was able to sift through detailed facts involving two warrants from two law enforcement agencies. She navigated a complicated interplay of facts and law in order to write a cohesive and concise appellate argument. In her sufficiency-of-the-evidence argument, she used fact-intensive case comparisons to persuasively argue that the government did not prove intent as defined under the charged statute. She is in the process of writing a reply brief in the same case.

Casey's second case was a habeas matter, where our Clinic supported a client in resentencing proceedings after we won his habeas appeal. In the matter of a few days, Casey crafted an argument for why the client deserved a full resentencing in state court rather than a harmless-error evaluation from the sentencing judge. Despite seemingly unfavorable to state law, Casey creatively argued for a full resentencing using the text of the federal district court order and the state's own court rules. The state appellate defender assigned to the case used Casey's argument with success at the client's status hearing.

In a third case, Casey volunteered to draft a federal habeas petition under 28 U.S.C. § 2255 for a former clinic client. She quickly absorbed new substantive and procedural law, familiarized herself with the relevant facts and background, and wrote an outstanding petition.

With these experiences, Casey will enter a clerkship with a strong understanding of district and appellate court procedure and practice. She also has a proven history as a strong and efficient writer. She picked up nuanced mechanics of brief writing quickly and incorporated editing feedback into future writing. Her drafts often required no major edits, and when they did require changes, Casey was able to turn over new drafts on a short timeline. She is dedicated to her work, sometimes working long hours over weekends and vacations and juggling cases with overlapping timelines. She takes responsibility for assignments when deadlines are short or outside the law school semester.

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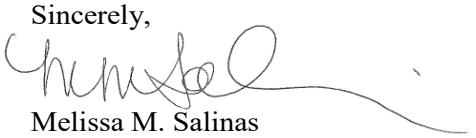
law-falclinic@umich.edu

Casey has also shown great communication and collaborative skills. I have seen her work with multiple teams and clients. She is a kind and thoughtful teammate who is easy to work with. I found Casey's work prior to law school to be a strength. She comes from a military background, and was able to see both sides of our cases in a unique way. She understood the perspective of law enforcement and also appreciated the importance of the rights of the accused. This allowed her to treat nuanced issues with a thoughtful respect for both sides.

In sum, Casey has a talent for addressing complex legal matters through clear, concise analysis and writing. She is trustworthy and prepared to handle complicated, confidential, and sensitive matters. Based the skills, aptitudes, and work ethic I have seen, I am confident Casey will be an excellent law clerk. I have observed no shortcomings, and recommend her with great enthusiasm.

Please do not hesitate to contact me at the Clinic office, on my personal cellular phone at (586) 530-6744, or by email at salinasm@umich.edu. It would be a pleasure to speak further about Casey.

Sincerely,



Melissa M. Salinas
Director, Federal Appellate Litigation Clinic

Cassandra D'Alesandro
14744 San Marsala Ct, Tampa, FL 33626
727-366-8666 • caranzad@umich.edu

WRITING SAMPLE

This writing sample is an excerpt from a reply brief I drafted for a federal criminal appeal that was filed in the Sixth Circuit. This draft benefited from light editing from my clinic supervisor; the filed version incorporates several rounds of edits. I have permission to use this as a writing sample and the client's name has been changed for privacy.

ARGUMENT IN REPLY

I. The district court erred by failing to suppress text messages found on the cage phone.

The district court erred in failing to grant Mr. Smith's request for a *Franks* hearing and in failing to exclude evidence resulting from an improper search of the cage phone. The Army warrant contained a false statement made with reckless disregard for the truth, and the Franklin County warrant so lacked indicia of probable cause that it was unreasonable for D'Hondt to rely upon the warrant to conduct her search.

A. Mr. Smith was entitled to a Franks hearing.

Mr. Smith was entitled to a *Franks* hearing because he satisfied both prongs of the *Franks* test requiring (1) a substantial showing that the warrant included a statement made with reckless disregard for the truth and (2) a showing that such statement was necessary for the probable cause finding. *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978).

The government offers excuses for Detective D'Hondt's failure to accurately testify to what phone calls she listened to on the day Army CID searched Mr. Smith's home. Gov't Br. 27–28. However, neither the government's excuses nor D'Hondt's alleged forgetfulness controverts the time-stamped access logs that prove D'Hondt was listening to the phone call between Mr. Smith and his mother

at the time it was made and prior to the point when Army CID sought a warrant. *See* Opening Br. 24–25 (explaining call log and access log overlap).

Because D'Hondt was listening to the calls in real time, she heard for herself what Mr. Smith said to his mother, and any statement she passed along to Army CID was made with full knowledge of the conversation. *See* R.52, Suppression Hearing, PageID#412 (D'Hondt testifies to telling Army CID what Mr. Smith said on the call). The issue for this Court then is whether the statement—"SGT Smith told his mother that any evidence against him would be found on his old cellular phones"—was false or misleading. It was.

The government uses, as it did below, a heavily excerpted transcript of Mr. Smith's jail phone call to characterize this false summary as a "misquote" or "paraphrase" Gov't Br. at 24–26, 29; R.41, Resp to Mtn to Suppress, PageID#320, 325. For this proposition, the government cites to an Eighth Circuit case, *United States v. Anderson*, 243 U.S. 478, 482 (8th Cir. 2001), where police quoted defendant as saying "put it up" when the defendant had actually said "put him up." The Eighth Circuit found that because the misquote was far from egregious, the defendant failed to make a substantial showing of intentional or reckless police behavior. *Id.*

Mr. Smith's phone call, however, contains approximately eight minutes of dialogue that primarily focuses on his fear that he would be arrested by Army CID

for unregistered weapons found in his home. *See* Gov't Exhibit 9, App. A (admitted into evidence at R.52, Suppression Hearing, PageID#443). From this conversation, D'Hondt, who was listening in in real time, derived "SGT Smith told his mother that any evidence against him would be found on his old cellular phones." This was a false or misleading statement.

The court's choice to rely on the government's selectively excerpted transcript rather than the full recording in its order was unreasonable and its conclusion that the Army warrant did not include a false or misleading statement and was clearly erroneous. *United States v. Young*, 847 F.3d 328, 367 (6th Cir. 2017); R.54, Report & Recommendation, PageID#501–02; R.61, Order Denying Suppression, PageID#591, 595–96 (adopting magistrate judge's characterization of the phone call). This Court should remand to the district court for a *Franks* hearing.

B. The Franklin County warrant was not supported by probable cause.

The district court erred when it held that an uncorroborated allegation made by Mr. Smith's nine-year-old stepdaughter, K.P., and the details of Mr. Smith's sting operation combined to form probable cause for the Franklin County warrant. R.61, Order Denying Suppression, PageID#598–99. The Franklin County warrant was so "lacking in indicia of probable cause as to render official belief in its existence

unreasonable." *United States v. Hodson*, 543 F.3d 286, 292 (6th Cir. 2008) (citation omitted).

1. K.P.'s allegation did not provide probable cause because she was an unreliable witness.

K.P.'s uncorroborated statement only justified reasonable suspicion for the purpose of an investigative stop because she was not reasonably trustworthy. *Wesley v. Campbell*, 779 F.3d 421, 430 (6th Cir. 2015) (holding that *Ahlers* presumption of veracity only applies when there is *no* reason to doubt witness's reliability). K.P. alleged Mr. Smith took a photo of himself touching her genitalia while she was naked. R.31-5, KYOAG Warrant, PageID#554–55. This statement was not corroborated by any other evidence.

The government asserts that K.P., a nine-year-old, was more trustworthy than the seven-year-old witness in *Wesley* because she was two years older. But the *Wesley* held that a child's accusation cannot be considered reasonably trustworthy without corroborating evidence of the alleged abuse—and did not draw fine lines based on the age of the child. *Id.* at 430–31. As discussed in Mr. Smith's opening brief, K.P.'s allegation had several of the same factors as the child-witness's statement in *Wesley* that led the court to find that the statement was untrustworthy. *See* Opening Br. 27–28.

D'Hondt and the investigating agency "failed to make any effort whatsoever to corroborate the [allegations]" before including the allegation in the affidavit for the

Franklin County warrant, which "undermines the allegation's presumed reliability." *Id*. at 433. The government claims D'Hondt would not have been aware of K.P.'s behavioral issues, despite the fact that Army CID was aware of it and that Army CID was coordinating with D'Hondt's investigation. R.60-3, CID Investigation Log, PageID#582; R.52, Suppression Hearing, PageID#365–66. If D'Hondt was not aware of K.P.'s history, it is illustrative of her lack of effort to corroborate K.P.'s allegations before including them in her affidavit. *See Wesley*, 779 F.3d at 433.

2. The details of the sting operation had no nexus with the cage phone.

The district court erred in holding the details of the sting operation leading to Mr. Smith's arrest had a nexus with the cage phone. For probable cause to exist, a "nexus between the place to be searched and the evidence sought" must be present, not "merely that the owner of property is suspected of a crime." *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006) (citations omitted). No nexus is present when a search is "designed and requested . . . for evidence of an entirely different crime." *Hodson*, 543 F.3d at 292. The details of the sting operation pertain to alleged criminal sexual solicitation, but the Franklin County warrant was designed to search the cage phone for pornographic photos of K.P. R.31-5, Franklin County Warrant, PageID#555–58.

The government argues the Franklin County warrant was designed to search for evidence of both molestation and child pornography and claims a nexus with the details of the sting operation on that basis. Gov't Br at 33. But even if that is a correct reading of the warrant, there is still no nexus between the details of the sting operation and the cage phone. Police seized Mr. Smith's Google Pixel phone when he was arrested. Gov't Brief at 33–34. The Google pixel phone was the one Mr. Smith used to answer D'Hondt's Craigslist ad and text message her. Gov't Br. 18. No evidence of that incident would have been found on the cage phone, nor did D'Hondt allege facts in her affidavit explaining why she believed evidence of that incident would be found on the cage phone.

3. The exclusionary rule applies to the fruits of the cage phone search.

The district court did not reach the question of whether the exclusionary rule should apply to the cage phone. R.61, Order Denying Suppression, PageID#600. The exclusionary rule properly operates where a warrant is so "lacking in indicia of probable cause as to render official belief in its existence unreasonable." *United States v. Leon*, 468 U.S. 897, 905, 923 (1984). D'Hondt's belief in the existence of probable cause underlying the Franklin County warrant was unreasonable because of her inclusion of K.P.'s uncorroborated allegation, *Wesley*, 779 F.3d 433, and her failure to establish a minimal nexus between the details of the sting operation and the cage phone, *Hodson*, 543 F.3d at 293.

The government contends that because Detective D'Hondt sought two warrants for the cage phone, that per se means she was acting in good faith. Gov't Br. 34–35. But it could equally mean that D'Hondt compounded her first instance of misconduct with another. This Court should reverse the district court's denial of the motion to suppress and should exclude the evidence found on the cage phone.

Applicant Details

First Name	**Michelle**
Middle Initial	**E.**
Last Name	**Dahl**
Citizenship Status	**U. S. Citizen**
Email Address	**mes10027@nyu.edu**
Address	**Address** Street **682 Willoughby Ave #1F** City **Brooklyn** State/Territory **New York** Zip **11206** Country **United States**
Contact Phone Number	**3017850051**

Applicant Education

BA/BS From	**Smith College**
Date of BA/BS	**May 2010**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Review of Law & Social Change**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Shapiro, Steven
stvnshapiro@gmail.com
Arons, Anna
anna.arons@nyu.edu;aronsa@stjohns.edu
530-574-6790
Shalleck-Klein, David
dshalleckklein@urbanjustice.org
(240) 888-9196
Satterthwaite, Margaret
margaret.satterthwaite@nyu.edu
212-998-6657

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a law student at NYU School of Law and am applying for a clerkship in your chambers for the 2024 term or for any subsequent terms.

After several years working in the nonprofit sector, I decided to pursue a public interest legal career and have focused my studies on civil rights litigation. I believe my commitment to public service, skills in legal research and writing, and experience as a professional with substantial responsibilities make me a strong candidate to serve in your chambers. I moved to Philadelphia for graduate school and stayed for several years until my husband's work took us to New York; I am particularly excited for the opportunity to move back to Philly for the next step in my legal career.

My application via OSCAR includes my resume, transcript, a writing sample, and four letters of recommendation. My writing sample was individually prepared as a research memorandum for my 1L summer employer, the Family Justice Law Center.

Letters of recommendation have been provided by Anna Arons, former Associate Director of the Lawyering Program at NYU and current Assistant Professor of Law at St. John's University, for whom I served as an NYU Lawyering Teaching Assistant; Steven Shapiro, Adjunct Professor of Law at NYU and Former ACLU National Legal Director, who taught my Current Issues in Civil Liberties and Civil Rights Seminar; David Shalleck-Klein, Executive Director and Founder of the Family Justice Law Center, my supervisor for my 1L summer internship; and Margaret Satterthwaite, Professor of Clinical Law at NYU and UN Special Rapporteur on the Independence of Judges and Lawyers, who directed my 2L clinic.

The contact information provided by each of my recommenders is as follows:
Anna Arons: aronsa@stjohns.edu, (530) 574-6790
Steven Shapiro: stvnshapiro@gmail.com
David Shalleck-Klein: dshalleckklein@urbanjustice.org, (240) 888-9196
Margaret Satterthwaite: margaret.satterthwaite@nyu.edu, (212) 998-6657

I would welcome the opportunity to speak further with you about my interest in serving as a clerk in your chambers and can be reached by email at michelle.dahl@nyu.edu or by phone at (301) 785-0051.

Respectfully,

/s/ Michelle Dahl

MICHELLE E. DAHL
Brooklyn, NY • (301) 785-0051 • michelle.dahl@nyu.edu • Pronouns: she/her

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
J.D. Candidate, May 2024
Unofficial GPA: 3.64
Honors: McKay Scholar, *Top 25% of the class after four semesters*
Review of Law and Social Change, *Staff Editor*
Activities: Lawyering Program, *Teaching Assistant*

UNITED LUTHERAN SEMINARY, Philadelphia, PA
M.A. in Public Leadership, awarded with honors by vote of the faculty, May 2016
Cumulative GPA: 3.83
Honors: Paul J. Hoh Award, *Academic merit and promise for service*
Presidential Scholarship
Field Work: J Street, *Mid-Atlantic Community Organizing Fellow*
Urban Controlled Environment Agriculture Initiative, *Research Assistant*

SMITH COLLEGE, Northampton, MA
B.A. in Government, minor in Religion, *cum laude*, May 2010
Cumulative GPA: 3.79
Honors: Dean's List (all six semesters); First Group Scholar, *Top 10% of the class after four semesters*
STRIDE Scholar, *Selective scholarship with work-study as faculty research assistant*
Phi Beta Kappa; Pi Sigma Alpha

EXPERIENCE

CIVIL RIGHTS IN THE CRIMINAL LEGAL SYSTEM CLINIC AT NYU, New York, NY
Law Student Advocate, August 2023 – May 2024

PROMISE OF JUSTICE INITIATIVE, New Orleans, LA
Civil Litigation Legal Intern, May 2023 – August 2023
Identifying plaintiffs, preparing documents for trial, and writing legal research memos for litigation to challenge prison conditions and policies affecting currently and formerly incarcerated individuals.

GLOBAL JUSTICE CLINIC AT NYU: JAILHOUSE LAWYER INITIATIVE, New York, NY
Law Student Advocate, August 2022 – May 2023
Researched and wrote national curriculum to guide jailhouse lawyers in pursuing innocence claims. Selected to present at the national Innocence Network conference.

FAMILY JUSTICE LAW CENTER, New York, NY
Legal Intern, June – August 2022
Researched § 1983 *Monell* claims to strategize for litigation of civil rights violations in the child welfare and family regulation system.

LYMPHOMA RESEARCH FOUNDATION, New York, NY
Associate Director; ***Senior Manager; Manager of Development***, September 2018 – July 2021
Directed Individual Giving (IG) portfolio for national nonprofit. Formulated strategic direction for IG and represented LRF to major donors. Led solicitation and secured $10M gift to establish new research initiative.

KENCREST, Philadelphia, PA
Donor Relations Coordinator; Fund Development and Marketing Specialist, January 2017 – August 2018
Development support for nonprofit serving individuals with intellectual disabilities.

ADDITIONAL INFORMATION

Served in AmeriCorps in Greenfield, MA in 2012 – 2013 working with at-risk middle school youth. Participated in year-long accompaniment program hosted by a Palestinian community in Jerusalem in 2011 – 2012, working with a fair trade organization and an international kindergarten full time.

Name:	**Michelle Elaine Dahl**
Print Date:	**06/07/2023**
Student ID:	**N13779808**
Institution ID:	**002785**
Page:	**1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Anna Arons			
Torts	LAW-LW 11275	4.0	B+
Instructor: Cynthia L Estlund			
Procedure	LAW-LW 11650	5.0	A
Instructor: Jonah B Gelbach			
Contracts	LAW-LW 11672	4.0	B
Instructor: Barry E Adler			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Trevor W Morrison, Alison J Nathan			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A-
Instructor: Melissa E Murray			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Anna Arons			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Roderick M Hills			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Sheldon Andrew Evans			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Trevor W Morrison, Alison J Nathan			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Civil Rights	LAW-LW 10265	4.0	A-
Instructor: Baher A Azmy			
Global Justice Clinic	LAW-LW 10679	3.0	A
Instructor: Margaret Lockwood Satterthwaite			
Global Justice Clinic Seminar	LAW-LW 11210	4.0	A
Instructor: Margaret Lockwood Satterthwaite			
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: Anna Arons			
Current Issues in Civil Liberties Seminar	LAW-LW 12610	2.0	A
Instructor: Steven Shapiro			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Global Justice Clinic	LAW-LW 10679	3.0	A
Instructor: Katherine Marie Gallagher			
Global Justice Clinic Seminar	LAW-LW 11210	3.0	A
Instructor: Katherine Marie Gallagher			
Evidence	LAW-LW 11607	4.0	A-
Instructor: Daniel J Capra			
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: Anna Arons			
After the 2022 Election: the Paths and Challenges of Political Reform Seminar	LAW-LW 12398	2.0	A-
Instructor: Robert Bauer			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	57.0	57.0

McKay Scholar-top 25% of students in the class after four semesters
Staff Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

NYU | LAW

STEVEN R. SHAPIRO
Adjunct Professor of Law

NYU School of Law
40 Washington Square South
New York, NY 10012

ss11538@nyu.edu

May 19, 2023

RE: Michelle Dahl, NYU Law '24

Your Honor:

Michelle Dahl was a student in a seminar I taught last fall at NYU Law School entitled "Current Issues in Civil Liberties and Civil Rights." She received an A in the course. Based on her performance and my experience working with numerous law students and young lawyers throughout my legal career, I am happy to offer my strong support for Michelle's clerkship application.

Until December 2016, I was the National Legal Director of the ACLU, a position I held for more than two decades. While at the ACLU, I supervised a staff of nearly 100 lawyers and participated in numerous hiring decisions, including hiring for ACLU fellowships available to recent law school graduates. I have also taught for 30 years at various law schools including, most recently, NYU, Columbia, and Stanford. Following my own graduation from law school, I had the opportunity to clerk for Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit, which gave me a keen understanding of both the demands of the job and the skills necessary to fulfill them. I am confident that Michelle would be an excellent law clerk if given the chance.

Every student in my seminar is required to submit a substantial research paper at the end of the term on a topic of his or her choice. Michelle's paper addressed the constitutionality of state FOIA laws that exclude incarcerated individuals from their coverage, thus denying prisoners the opportunity to access public records that might support a claim for post-conviction relief. It is not an issue I had previously considered.

Michelle's paper was informative, well-researched, well-written, balanced, and creative. She began by explaining that access to material outside the judicial record is especially critical when pursuing post-conviction relief based on alleged *Brady* violations or claims of ineffective assistance of counsel, and that the importance of such evidence has been magnified by the imposition of heightened pleading standards and the procedural requirements applicable to habeas corpus petitions under the Antiterrorism and Effective Death Penalty Act (AEDPA). She then considered potential due process and equal protection challenges to the FOIA exclusions.

Her due process argument properly began with an acknowledgement that substantive due process claims are now disfavored. She therefore narrowed her focus to the principle that prisoners have a due process right of meaningful access to the courts, first recognized by the Supreme Court in *Bounds v. Smith*, which would be effectively frustrated if prisoners were

denied even the opportunity to seek public records that might substantiate their claim of an unconstitutional conviction.

Many law students might have stopped there. Michelle, however, went on to confront two arguments that would likely be raised by those defending the FOIA prisoner exclusions from a due process challenge. First, she noted, the Supreme Court held in *Lewis v. Casey* that states are not obligated to facilitate the filing of prisoner petitions. At the same time, the Court reiterated that states may not deny or obstruct a prisoner's ability to seek habeas relief. Relying on that distinction, Michelle explained why the exclusion of prisoners from FOIA should more properly be characterized as an obstruction of habeas relief than a failure to facilitate it. Second, Michelle distinguished the state's post-conviction refusal to provide access to DNA testing, which the Supreme Court upheld in *District Attorney's Office v. Osborne*, from the state's refusal to permit a prisoner's use of FOIA, explaining that only the latter challenges a procedural defect in the underlying conviction.

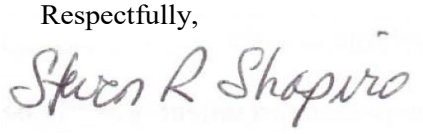
The equal protection section of Michelle's paper began with the recognition that any equal protection claim was likely to be subject to rational basis review. Applying rational basis review, Michelle concluded that an equal protection challenge to the FOIA exclusion was unlikely to succeed against a asserted concern about the administrative burden imposed by an anticipated flood of prisoner FOIA requests. Michelle then considered, but ultimately rejected, the argument that the state's equal protection defense could be overcome by showing that its FOIA exclusion rested on mere animus against prisoners.

Finally, Michelle ended her paper with an argument that any application of the FOIA exclusion to pretrial detainees would be unconstitutionally punitive under *Kennedy v. Mendoza-Martinez*. Here, Michelle's principal point was that the state's concern about frivolous filings might not be entitled to the same deference in this context as it was in assessing an equal protection claim.

In short, Michelle demonstrated throughout her paper a nuanced understanding of legal doctrine and a mature understanding that the most effective legal arguments do not attempt to disguise their difficulties. Nor did she allow her personal preferences to dictate her legal analysis. Her comments in class were similarly insightful and demonstrated an interest in a wide range of legal issues. On a personal level, Michelle was both engaged and engaging in our one-on-one conversations. I hope you will give her application serious consideration.

Please do not hesitate to contact me if I can be of any further assistance. I can be reached at ss11538@nyu.edu.

Respectfully,



Steven R. Shapiro

NYU LAW

ANNA ARONS
Acting Assistant Professor
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Impact Project Director
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May 31, 2023

RE: Michelle Dahl, NYU Law '24

Your Honor:

I write to recommend Michelle Dahl for a clerkship in your chambers. I taught Michelle in Lawyering, an intensive yearlong course, during the 2021-2022 academic year. Based on that experience, I asked her to be my Teaching Assistant for Lawyering for the 2022-2023 academic year. I know Michelle to be a deft researcher and a clear writer, an incisive and engaged critical thinker, and an empathetic and generous classmate and leader. I am confident that she would bring these same outstanding qualities to a clerkship and I recommend her without reservation.

Michelle excelled as a student in my first-year Lawyering class. Lawyering is a simulation-based course that serves as a rigorous introduction to the foundational skills of legal practice—not only legal analysis, research, and writing, but also skills like interviewing clients, investigating factual claims, negotiation, and oral advocacy. Outside of class sessions, students meet with me regularly throughout the year, both one-on-one and in small groups, to reflect on their progress and to practice self-critique and peer critique.

In her writing, Michelle consistently presented well-organized, clear, and credible arguments grounded in thorough research and a careful understanding of relevant authority. Her legal analysis showed that she has great instincts for triaging arguments and synthesizing credible but favorable rules. Over the course of the year, her skills only deepened, thanks in no small part to her receptiveness to feedback and her enthusiasm for improving her own skills. She more than once sought out additional rounds of feedback on written assignments and additional opportunities to practice skills like oral argument beyond those required for the course. She was notably receptive to feedback from me and from her classmates—and excellent at giving it as well. It has been exciting, too, to see Michelle continue to develop these skills, in her clinic and in her summer position—and as her internship her first summer was with a strategic litigation organization that I myself work closely with, I have had a front-row seat to that development.

Michelle's participation in class and in smaller group meetings likewise reflected her well-developed critical thinking skills. She regularly moved beyond surface-level understanding of course materials—for instance, she frequently raised questions about lawyers' roles and ethical obligations or concerns about biases reflected within the legal profession and legal system. Her previous career in nonprofit management gave her unique insights into the day-to-day concrete realities of working within our admittedly imperfect legal system, and her contributions to class deepened our discussions and benefited her classmates immensely. Outside class, she frequently sought me out in office hours to continue these discussions, to ensure that she fully understood doctrine and feedback on her assignments, and to discuss possible career paths. In all of this, she

displayed the sort of eagerness—to explore new ideas, to challenge herself, to engage with those around her, and to receive feedback and build on it—that I am always thrilled to see in students.

Michelle's development as a writer, excitement for learning, and curiosity and compassion distinguished her from her peers. In light of that, I encouraged her to apply to be a teaching assistant for my Lawyering class this year and selected her from a competitive pool. In this position too Michelle exceeded all of my expectations. Throughout the year, she provided meticulous and accurate feedback on students' written work, taught class sessions, met with students individually and in small groups to provide additional instruction, and served as a mentor, helping students navigate their often-difficult first year of law school. She carried out each of her duties diligently, thoughtfully, and effectively. I counted on her level-headed feedback to guide me in my own teaching, as well; I knew I could rely on her to provide me an honest, thoughtful, and informed account of the class's needs and concerns.

Finally, on a personal level, Michelle is a delight to work with. She is enthusiastic, conscientious, and kind, not to mention self-motivated and fully dedicated to all that she takes on. Whether working for a disorganized professor or for a brand-new new organization, Michelle's flexibility, good humor, and resilience continued to shine through. Perhaps because of her time off between college and law school, I found that even in the pressure-cooker of law school, she maintained a sense of perspective and balance, never losing sight of the big picture. Even in a year of far too many meetings, I continued to look forward to checking in with Michelle, knowing that she would not only provide valuable insight into our students' needs but also brighten my day with her wry sense of humor. I suspect Michelle would bring this same thoughtful, good-humored approach to her clerkship and that she would make the term a genuine pleasure.

If you have any questions or would like any additional information, I am more than happy to talk further. I can be reached on my cell phone at 530-574-6790 or, until July 1, by email at anna.arons@nyu.edu. Following that date, I will be joining the faculty at St. John's University School of Law, but I remain available to provide additional information and can be reached then at aronsa@stjohns.edu.

Sincerely,

Anna Arons

FJLC

FAMILY JUSTICE LAW CENTER

May 21, 2023

Your Honor:

I write to enthusiastically recommend Michelle Dahl as a candidate for a judicial clerkship in your chambers. I am the executive director and founder of the Family Justice Law Center (FJLC) where I had the privilege of supervising her last summer as a legal intern.

During my time clerking for the Honorable Tanya S. Chutkan on the U.S. District Court for the District of Columbia, I became familiar with the traits and assets that make a clerk a valuable addition to chambers. Michelle has them all—she's determined, motivated, collaborative, brilliant, and a joy to work with and learn from.

I hired Michelle in the early days of FJLC soon after the organization launched. FJLC began with a flurry of funding and news coverage, and I needed someone who could be flexible in adapting to changing needs, able keep up with new information and understand the various contexts in which FJLC had to operate, and reliable and self-starting. She was excited by the challenge and rose to meet it with ease and insight.

During her summer with FJLC, we worked to develop potential legal theories to use in affirmative strategic litigation targeting illegal searches of homes and seizures of children by child welfare agencies. Case law on the topic is complex, and the research required creativity and persistence. As part of a team of three interns, she deftly both assisted with and led research into several areas of law that were new to her with an eye to applying them in a novel context.

Michelle independently researched the state of the law in the Second Circuit regarding Fourth Amendment claims of *Monell* liability, successfully capturing the scope of jurisprudence in light of the varied approaches of lower courts, identifying both common threads of analysis and points of deviation that we could leverage in potential litigation. In her thorough research, she uncovered a range of cases that could be analogized to the context of litigation against child welfare agencies—a challenge given the dearth of on-point cases relevant to our future litigation—while also tracking and recording other cases that could be useful to her teammates or future FJLC staff researching related issues. She skillfully pulled out relevant facts and outcomes that proved to be highly practicable. She also contributed her research proficiency to team research assignments, including particular aspects of *Monell* liability and voluntariness in the child removal context, contributing a solid foundation of knowledge for further work. In communicating the results of her research, Michelle's writing was concise, comprehensive, and well structured. Because she is able to contextualize discrete rules and applications within larger doctrinal underpinnings, her writing places the specifics of her research findings into an easy-to-follow structure and flow that adeptly capture nuance. Given that she was able to do this work so

effectively after just her 1L year, I am confident her talents will be superlative by the time she graduates from NYU.

Not only does she produce work of high quality, but Michelle also undertakes assignments with great professionalism and a sense of responsibility. She understands that legal work has painfully real ramifications for people's lives and invests herself in it accordingly. Her previous professional experience clearly has prepared her to be a hard worker with high standards for herself. She worked under pressure with shifting timelines; managed multiple projects simultaneously, from pulling case documents from dockets to conducting research, to preparing external communications about FJLC; and managed her time and priorities effectively as an independent worker, while supporting her fellow interns. Even when a family emergency pulled her out of town toward the end of the summer, she maintained her assignments on track and delivered as promised. She brings high ethical standards to her work, particularly with respect to confidentiality as was necessary in her previous fundraising career. Therefore, I could trust her with sensitive information and internal documents in a way that is unusual with interns.

Lastly, on a small team, disposition and social intelligence are indispensable; Michelle always brought a positive attitude and integrated seamlessly into an evolving workplace. With a sense of humor and respect for her coworkers, she contributed to a warm work environment that created trust and a collaborative spirit. She was a natural leader, organizing the other interns and their work, while maintaining a humble and cooperative attitude that prioritized team success. Michelle takes feedback extremely well, using it as an opportunity to improve herself as a lawyer, and approaches tasks with great openness to learning. In the office and with staff from other organizations, she quickly established friendly rapport with individuals at all levels.

I have remained in contact with Michelle and I am excited to support her as she grows in the field. In any position, Michelle will remain a resource long after she moves on to new challenges. She develops meaningful relationships with her mentors and coworkers and, as I have seen already when I have tapped her expertise from her previous career in my own work, she continues to support her network in any way she can.

I was fortunate to have Michelle as an intern at such a critical time for FJLC and I wholeheartedly recommend her for a judicial clerkship.

Sincerely,

/s/ David Shalleck-Klein
David Shalleck-Klein

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am pleased to write this letter recommending Michelle Dahl for a clerkship in your chambers. Ms. Dahl is a bright and committed law student with unusual integrity. I am confident that her legal skills, elegant writing ability, and utmost responsibility would make her an excellent law clerk.

Ms. Dahl was enrolled in the Global Justice Clinic this year, which I direct. In the classroom, Ms. Dahl's collaborative, deeply thoughtful approach to issues of justice and the law were apparent. She was always well-prepared for class, having reflected on the issues raised in both the readings and in her fieldwork. She was a reliable contributor of insightful comments in class discussions, bringing unique analyses, relevant experiences, and probing questions to the seminar. Ms. Dahl's poise and professional maturity also came through in our seminar. She was singularly focused on the collaborative learning endeavor in which we were engaged, drawing out her colleagues and making remarks that bridged insights from the readings with fieldwork experiences.

Ms. Dahl's strengths were even more apparent in her clinic fieldwork. Assigned to the Jailhouse Lawyer Initiative (JLI), Ms. Dahl created a national curriculum module for jailhouse lawyers about how to pursue innocence claims for themselves and their peers. To construct this module, Ms. Dahl mastered the law on this complex topic, then interviewed numerous people in the field. Her interviews included staff at the Innocence Project, as well as former jailhouse lawyers, exonerees, and an individual actively pursuing an innocence claim. She then developed an outline and individually conducted desk research before drafting the module to address each topic recommended for inclusion by the interviewees.

The final module Ms. Dahl created included some sixty pages of legal background, directions for legal research into relevant laws and procedures, strategic considerations, instructions for engaging formal legal assistance, and exercises to check understanding and practice skills. Moreover, Ms. Dahl designed the module using a legal empowerment, approach, which seeks to equip those most impacted by a legal system to know, use, and engage in shaping the law. Ms. Dahl also submitted, along with her clinic partner, a proposal for a workshop that was selected for presentation at the national Innocence Network Conference. They created and facilitated a workshop with an exoneree and former jailhouse lawyer to discuss the innocence module and the potential role of jailhouse lawyers in exoneration work.

Ms. Dahl spent long hours on her clinic project while also serving as a Staff Editor for the Review of Law and Social Change and a Teaching Assistant with the 1L Lawyering Program. She also brings a track record of graduate divinity study and full-time work in fundraising, two settings where her capacity to combine searching inquiry with the production of real-time work product were put to the test. Ms. Dahl's ability to juggle many commitments and produce high-quality work with results would serve her well in a fast-paced environment like a judge's chambers.

On a personal level, Ms. Dahl is kind and generous with her time. She is attentive to the ethos of a group, working to ensure all are included and feel valued. I believe these attributes would make her a valued presence in chambers.

Please do not hesitate to contact me to discuss Ms. Dahl's application. I would be delighted to speak at your convenience.

Yours sincerely,

Margaret Satterthwaite

Margaret Satterthwaite - margaret.satterthwaite@nyu.edu - 212-998-6657

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WRITING SAMPLE

The following writing sample is a research memorandum individually prepared for the Family Justice Law Center; it is shared with the permission of my supervisor. The memorandum explores a theory of liability for family regulation practices in New York City. Because the assignment was to explore a potential legal theory that would then be used to identify a case for affirmative litigation, the memorandum does not apply the analysis to specific facts. This draft includes minimal edits I individually made after verbal feedback from my supervisor about structure, bluebook conventions, and areas for further research.

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WRITING SAMPLE

MEMORANDUM

To: David Shalleck-Klein, Executive Director
From: Michelle Dahl, Legal Intern
Date: August 12, 2022
Re: *Monell* Claims Involving Customs and Practices

I. Introduction

The following memo contains research into the state of the law in the Second Circuit regarding Fourth Amendment claims of *Monell* liability against municipalities. The research is oriented to support a federal claim against New York City for practices of the Administration for Children's Services that violate families' Fourth Amendment protections against illegal searches and seizures.

The memo first overviews the contours of a claim of municipal liability under 42 U.S.C. § 1983 for a violation of an individual's federal rights, including the requirement to show a municipal policy or custom. Next, several theories for establishing a policy or custom for liability are outlined before focusing on one in particular: establishing a custom or practice so widespread that it has the force of law with the constructive acquiescence of policymakers. A brief analysis of the elements for such a theory is included: practical force of law, implications of constructive acquiescence, and standards of "permanent and well settled" versus "persistent and widespread."

Because the Second Circuit's analysis of a custom or practice claim of *Monell* liability generally focuses on a standard of "widespread," the memo moves on to discuss what allegations and evidence of widespread practice are sufficient to constitute a *Monell* claim. This includes a discussion of cases in the circuit that have alleged widespread municipal practices of Fourth Amendment violations. As evidence of practices of such violations, plaintiffs have included in their claims, to varying degrees of success, allegations of other instances of violations in the municipality, other lawsuits or public complaints about the violations, and relevant third-party official reports, documentation, and research.

II. Section 1983 Civil Actions Against Municipalities: *Monell* Claims

42 U.S.C. § 1983 "provides a cause of action against state actors who violate an individual's rights under federal law." *Filarsky v. Delia*, 566 U.S. 377, 380 (2012). A § 1983 claim can be filed against "a person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

A local government is considered a "person" subject to liability under § 1983 but cannot be held liable on a *respondeat superior* theory. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978).

A municipality can be held liable under a *Monell* claim based on the acts of a public official if the plaintiff can prove: "(1) actions taken under color of law; (2) deprivation of a constitutional or statutory

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right; (3) causation; (4) damages; and (5) that an official policy of the municipality caused the constitutional injury." *Roe v. City of Waterbury*, 542 F.3d 31, 36 (2d Cir. 2008) (citing *Monell*, 436 U.S. at 690-91). "At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged." *Okla. City v. Tuttle*, 471 U.S. 808, 823 (1985).

A *Monell* claim in New York must be levied against the municipality rather than an agency. "Under New York law, departments that are merely administrative arms of a municipality do not have a legal identity separate and apart from the municipality and, therefore, cannot sue or be sued." *Davis v. Lynbrook Police Dep't*, 224 F. Supp. 2d 463, 477 (E.D.N.Y. 2002).

A. Fifth Element: Policy or Custom Requirement for *Monell* Claims

In a *Monell* claim, the plaintiff must identify a municipal "policy or custom." *Monell*, 436 U.S. at 694. "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. These are actions for which the municipality is actually responsible." *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (citations and internal quotation marks omitted).

Lower courts in the Second Circuit have identified four theories a plaintiff can allege to establish an official policy or custom for municipal liability, as summarized in *Avant v. Miranda*:

> (1) [T]he existence of a formal policy which is officially endorsed by the municipality; (2) actions taken or decisions made by municipal policymaking officials, *i.e.*, officials with final decisionmaking authority, which caused the alleged violation of the plaintiff's civil rights; (3) a practice so persistent and widespread as to practically have the force of law, or that was so manifest as to imply the constructive acquiescence of senior policy-making officials or (4) that a policymaking official exhibit[ed] deliberate indifference to constitutional deprivations caused by subordinates.

Avant v. Miranda, No. 21-CV-0974(JS)(SIL), 2021 U.S. Dist. LEXIS 94511, at *6-7 (E.D.N.Y. May 18, 2021) (citations and internal quotation marks omitted).[1]

B. Third Theory of Liability: Widespread Practice as Policy or Custom

i. Widespread Practice as Having the Force of Law

Under the third theory of liability, the practice or custom does not need to be "authorized by written law or express municipal policy" to be considered to have force of law. *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). Instead, this type of liability involves establishing "practices so persistent and widespread as to practically have the force of law," *Connick*, 563 U.S. at 61.

[1] *Avant* cites the following for each theory: (1) *Connick v. Thompson*, 563 U.S. 51, at 60-61 (2011); (2) *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 126 (2d Cir. 2004); *Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir. 2000); (3) *Connick*, 563 U.S. at 61; *Green v. City of N.Y.*, 465 F.3d 65, 80 (2d Cir. 2006); *Patterson v. Cty. of Oneida, N.Y.*, 375 F.3d 206, 226 (2d Cir. 2004); (4) *Cash v. Cty. of Erie*, 654 F.3d 324, 334 (2d Cir. 2011); *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 439 (2d Cir. 2009).

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ii. Need for Practice to Imply Constructive Acquiescence

A municipality's liability can be established "by demonstrating that the actions of subordinate officers are sufficiently widespread to constitute the constructive acquiescence of senior policymakers." *Sorlucco v. N.Y.C. Police Dep't*, 971 F.2d 864, 871 (2d Cir. 1992). "Though the Second Circuit has not explicitly reaffirmed [this] 'constructive acquiescence' theory of *Monell* liability articulated in *Sorlucco* since the Supreme Court decided *Connick*, the Second Circuit continues to hold that if a practice of misconduct is sufficiently widespread, the municipality may be assumed to have acquiesced in it, even in the absence of direct evidence of such acquiescence." *Davis v. City of N.Y.*, 959 F. Supp. 2d 324, 338 n.51 (S.D.N.Y. 2013).

Municipalities' "affirmative steps to investigate and correct the City's misconduct, including specific directions to the city agency to correct incidents of non-compliance," can indicate a lack of tacit authorization or constructive acquiescence. *Reynolds v. Giuliani*, 506 F.3d 183, 197 (2d Cir. 2007). *Reynolds* involved liability based on a failure to train; it is unclear if affirmative steps to investigate and correct an unofficial custom or practice would similarly show a lack of acquiescence.

iii. Practice Widespread Enough to Imply Policymaker Acquiescence vs. Practice of Supervisory Acquiescence

Courts have used the widespread practice theory of liability to cover two seemingly different types of patterns of violations. The first is a pattern of violations committed by enough individuals across the agency such that the actual violations are considered widespread practice, or standard operating procedure, manifest enough to imply municipal acquiescence of policymaking officials. The second is a pattern of violations committed persistently by one or a few individual employees such that the supervisor's continued acquiescence is considered a practice.

In the first type, a widespread practice of alleged illegal behavior, the widespread nature of the actions implies the constructive acquiescence; no instances of knowledge by supervisors are necessary as there is constructive, not actual, acquiescence implied. "It is sufficient to show, for example, . . . that a discriminatory practice of subordinate employees was so manifest as to imply the constructive acquiescence of senior policy-making officials." *Patterson v. Cty. of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004) (citation and internal quotation marks omitted).

In the second type, a practice of acquiescence, there must be "sufficient instances of tolerant awareness by supervisors" of the alleged illegal behavior before the practice can be considered "so persistent and widespread that it can constitute a custom or usage" for liability. *Lucente v. Cty. of Suffolk*, 980 F.3d 284, 298 (2d Cir. 2020).

This memo focuses on the first type, a widespread practice of constitutional violations across an agency from which constructive acquiescence of policymakers can be inferred.

iv. Permanent and Well Settled vs. Persistent and Widespread Practice

Some courts have used a standard of a "permanent and well settled" practice to determine if a custom has the force of law for *Monell* liability, as described in the pre-*Monell* case *Adickes v. S.H. Kress &*

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Co., 398 U.S. 144, 168 (1970). *See also Praprotnik*, 485 U.S. at 127 ("A plaintiff can allege the existence of a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law.") (citation and internal quotation marks omitted).

It is unclear if "persistent and widespread" as described in *Connick* has supplanted "permanent and well settled" as the necessary standard for indicating if a custom has force of law sufficient for municipal liability. *See Cipolloni v. City of N.Y.,* 758 F. App'x 76, 78-79 (2d Cir. 2018) (using "persistent and widespread" without mention of "permanent" or "well settled" in claim alleging practice of false arrests based on database errors); *but see Lynch v. City of N.Y.,* 952 F.3d 67, 79-80 (2d Cir. 2020) (citing both "persistent and widespread" and "permanent and well settled" as constituting a custom with force of law in claim for a practice of false arrests); *Kucharczyk v. Westchester Cty.*, 95 F. Supp. 3d 529, 539-43 (S.D.N.Y. 2015) (stating the plaintiff "must prove that the custom at issue is permanent and well-settled" for municipal liability, but instead focusing on sufficiency of complaint to show a "widespread policy or practice" of denying inmates adequate medical care); *Sanossian v. Brennan,* No. CV 16-4697 (JMA) (AKT), 2018 U.S. Dist. LEXIS 28939, at *36-37 (E.D.N.Y. Feb. 20, 2018) (combining "persistent and widespread" and "permanent and well settled" by analyzing if alleged practice of discrimination is either widespread or permanent and well settled).

Regardless of use of the "permanent and well settled" standard, courts focus on if the practice is sufficiently "widespread" to constitute a policy or custom for *Monell* liability, and practice claims have succeeded without offering evidence of the temporal permanence of an alleged practice, focusing on its pervasive nature instead. *See, e.g.*, *Floyd v. City of N.Y.,* 959 F. Supp. 2d 540, 659-60 (S.D.N.Y. 2013).

v. "Widespread" Definition or Standard

"Widespread" is not often clearly defined by the courts. "There is no set number of incidents that make a practice 'widespread,' and courts have found a wide range of instances insufficient to plausibly allege a municipal custom." *Gem Fin. Serv. v. City of N.Y.*, 298 F. Supp. 3d 464, 491 (E.D.N.Y. 2018). One court in the Southern District of New York has defined it as meaning actions "are common or prevalent throughout the agency." *Davis v. City of N.Y.*, 228 F. Supp. 2d 327, 346 (S.D.N.Y. 2002). This commonsense definition seems implied across the courts as they seek evidence of a high rate of use of the practice, as described below.

vi. Making a Claim of Widespread Custom or Practice

a. Pleading Standard for a *Monell* Claim

"Although there is no heightened pleading requirement for complaints alleging municipal liability under § 1983, a complaint does not suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Kucharczyk v. Westchester Cty.*, 95 F. Supp. 3d 529, 540 (S.D.N.Y. 2015) (citations and internal quotation marks omitted). "The mere assertion . . . that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference." *Montero v. City of Yonkers*, 890 F.3d 386, 403-04 (2d Cir. 2018) (citation omitted).

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"The broader the policy a plaintiff seeks to plead, the greater the factual allegations that are required to render it plausible." *Patterson v. City of N.Y.*, No. 16-CV-3525 (NGG) (SMG), 2017 U.S. Dist. LEXIS 126279, at *35 (E.D.N.Y. Aug. 8, 2017) (citation omitted).

In a seemingly rare case that allowed a claim to survive a 12(b)(6) motion despite "threadbare" allegations, the court ruled that because of the municipality's control of access of information on its officers' misconduct and the resulting need for discovery, as well as the closeness of the question and the gravity of allegations, the benefit of the doubt should be given to the plaintiff. *Dixon v. City of Syracuse*, 493 F. Supp. 3d 30, 38 (N.D.N.Y. 2020).

b. Sufficiency of Allegations for a *Monell* Custom or Practice Claim

"[A] a single incident alleged in a complaint, especially if it involved only actors below the policy-making level, does not suffice to show a municipal policy." *Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991). There is a recognized exception, irrelevant to discussion of custom and practice claims, in which "a single unusually brutal or egregious beating administered by a group of municipal employees" is "sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision." *Turpin v. Mailet*, 619 F.2d 196, 202 (2d Cir. 1980).

A bright line rule for a standard of how persistent or widespread a practice must be to imply senior policymaker knowledge or acquiescence and thus municipal liability has not emerged in the Second Circuit. Instead, courts have determined different combinations of evidence of a practice or custom to be sufficient or insufficient for a *Monell* claim on a case-by-case basis.

Combining sources of evidence can strengthen the claim. *See, e.g., Jok v. City of Burlington*, No. 2:19-cv-70, 2022 U.S. Dist. LEXIS 25904, at *48 (D. Vt. Feb. 14, 2022) ("Under *Monell's* third factor, a reasonable fact finder could conclude that the City of Burlington permitted a widespread practice of permitting higher use of force against Black citizens, as evidenced by use of force reports, the ACLU letter addressed to the Burlington Police Department, other lawsuits, news articles and academic studies."); *but see, e.g., Joseph v. N.Y.C. Police*, No. 16-CV-2004 (PKC) (LB), 2017 U.S. Dist. LEXIS 155426, at *12-17 (E.D.N.Y. Sep. 22, 2017) (finding a claim to be insufficient despite factual allegations including three other specific instances not involving the plaintiff, roughly 180 claims substantiated by the Civilian Complaint Review Board (CCRB), newspaper reports, third-party lawsuits, and recordings of supervisory instructions; each allegation was decided to be insufficient on its own, rather than considered in the aggregate).

c. Sources of Evidence for a *Monell* Custom or Practice Claim on Fourth Amendment Violations

Other instances of the practice:

Evidence of other instances of the practice help establish a pattern or practice broader than the plaintiff's singular alleged incident.

- Claim of two other instances of violations against same victim as insufficient: Two other instances of the plaintiff being subjected to the same excessive arrest as in the current claim

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by police officers are together insufficient to show a persistent or widespread practice; police department's motion for summary judgment on *Monell* excessive force claim granted. *Watson v. City of Kingston-Kingston Police Dep't*, No. 1:15-cv-1356(BKS/DEP), 2018 U.S. Dist. LEXIS 159513, at *19 (N.D.N.Y. Sep. 19, 2018).

- Three total instances over several years as insufficient: "Plaintiff's evidence showed two instances, or at the most three, over a period of several years in which a small number of officers abused the rights of black people, and one incident in which an officer indicated a disposition to abuse the rights of black people. This evidence fell far short of showing a policy, custom, or usage of officers to abuse the rights of black people, and far short of showing abusive conduct among officers so persistent that it must have been known to supervisory authorities." Judgment in Plaintiff's favor reversed. *Jones v. Town of E. Haven*, 691 F.3d 72, 85 (2d Cir. 2012).
- Six incidents over five years as insufficient: "Half a dozen dissimilar incidents spread over the past five years fail, as a matter of law, to render the generalized, conclusory allegations of the existence of a policy of abuse towards transgender persons that White alleges plausible." City's motion to dismiss granted. *White v. City of N.Y.*, 206 F. Supp. 3d 920, 938 (S.D.N.Y. 2016).
- Five incidents out of 175,000 arrestees over seven years as insufficient: "Based on five incidents, the court finds that even if plaintiff was subjected to an unconstitutional strip-search, it was random in nature and not a 'policy' or 'custom' within the meaning of *Brown* and *Monell*. Given that more than 175,000 arrestees were processed and searched between 1988 and 1995, the occurrence of at most five illegal searches during a seven-year time period fails to constitute a 'policy' or 'custom' within the meaning of *Brown* or *Monell*." City's motion for summary judgment granted. *Dettelis v. City of Buffalo*, 3 F. Supp. 2d 341, 348 (W.D.N.Y. 1998).
- Need for total number of illegal and non-illegal incidents for context: "Plaintiff points to . . . the CCRB's substantiation of 'approximately 180 cases of Police Officers improperly entering and searching the homes of New York City residents' between 2010 and 2015. Plaintiff does not allege, however, the total number of searches conducted in the same time period by the NYPD. Absent that statistic, the Court is unable to evaluate the significance of . . . the CCRB statistic that Plaintiff cites, let alone infer a widespread custom . . . ." City's motion to dismiss granted. *Joseph v. N.Y.C. Police*, 2017 U.S. Dist. LEXIS 155426, at *12.
- Claim survived motion to dismiss by combining eyewitness accounts and internal agency documents: "Plaintiff has alleged that both eyewitness accounts and internal police documents show the existence of a specific pattern of misconduct, *viz.*, handcuffing transgender detainees to railings, and further show official inaction in the face of this pattern. Plaintiff claims that an internal NYPD recommendation called for changes in the department's treatment of transgender people, but the NYPD chain of command took no steps in response to it. He claims that numerous transgender people detained by the NYPD have alleged they were chained to railings. For instance, plaintiff describes the 2007 deposition testimony of a transgender man who had been handcuffed to a railing." City's motion to dismiss denied for *Monell* claim. *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 142 (S.D.N.Y. 2015).

MICHELLE E. DAHL
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WRITING SAMPLE

- Consistency of other testimony as supportive of allegation: "The consistency of the testimony across the various stores, located throughout the city, also support the existence of a widespread policy." City's motion for summary judgment denied for plaintiff's claim of unlawful NYPD searches and seizures. *Gem Fin. Serv.*, 298 F. Supp. 3d at 493.

Other lawsuits or public complaints to the government:

"The Second Circuit and the district courts within the Second Circuit have held that a plaintiff's citation to a few lawsuits involving claims of alleged excessive force is not probative of the existence of an underlying policy by a municipality, police department, or department of corrections." *Ameduri v. Vill. of Frankfort*, 10 F. Supp. 3d 320, 341 (N.D.N.Y. 2014). "[M]erely alleging that suits and complaints were filed — without more — is insufficient to support a claim of 'a pattern of similar constitutional violations.'" *Doe v. Smereczynsky*, No. 3:16-cv-394 (MPS), 2017 U.S. Dist. LEXIS 88628, at *10 (D. Conn. Mar. 23, 2017). "A list of cases may only support an allegation of widespread practice when they are combined with anecdotal evidence and other factual allegations of the alleged policy or custom." *Jones v. City of N.Y.*, No. 13-CV-929 (ALC), 2016 U.S. Dist. LEXIS 44609, at *25-26 (S.D.N.Y. Mar. 31, 2016).

Pointing to other cases may be insufficient to support an allegation of a widespread practice if the claims are for alleged violations different from the misconduct alleged in the complaint, if they post-date the alleged misconduct in the current case, or if they do not result in an adjudication of liability or result in settlements without admissions of liability. *Tieman v. City of Newburgh*, No. 13-CV-4178 (KMK), 2015 U.S. Dist. LEXIS 38703, at *48-49 (S.D.N.Y. Mar. 26, 2015).

- Claim insufficient due to a lack of factual bases to demonstrate similarity of complaints: Even while noting the "Plaintiff is not required to provide voluminous specific detail of many specific substantiated complaints in order to survive a motion to dismiss," a claim of a practice of excessive force based on "numerous" complaints to a Citizens' Review Board was insufficient due to a lack of specificity regarding those complaints, such as the number of substantiated complaints, when they were made, and the relevant facts such as "type of force, the race of the victims, and other circumstances that bear on determining whether they are sufficiently similar to the alleged unconstitutional conduct in this case." *Arrindel-Martin v. City of Syracuse*, No. 5:18-CV-0780 (GTS/ATB), 2018 U.S. Dist. LEXIS 212597, at *12-14 (N.D.N.Y. Dec. 18, 2018) (granting city's motion to dismiss). *See also Doe,* 2017 U.S. Dist. LEXIS 88628, at *13 (finding insufficient claim when "no effort" was made to allege similarity with other pending cases and complaints of excessive force), *Woodhouse v. City of Mount Vernon*, No. 1:13-cv-00189 (ALC) (HBP), 2016 U.S. Dist. LEXIS 10098, at *22-24 (S.D.N.Y. Jan. 26, 2016) (finding no facially plausible case of municipal custom of excessive force based on other pending claims due to failure to provide allegations, timeframe, outcome, parties involved, or other information to "assist the Court in identifying the suits").
- Other complaints must have resulted in liability: Even if complaints in other lawsuits involved comparable conduct to that alleged by a plaintiff, they "are insufficient to plausibly support an inference of a widespread custom" if they did not result in an adjudication of liability. *Tieman*, 2015 U.S. Dist. LEXIS 38703, at *48. *See also Walker v. City of N.Y.*, No. 14-CV-808 (ER), 2015 U.S. Dist. LEXIS 91410, at *19-20 (S.D.N.Y. July 14, 2015) (finding

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a claim of a practice insufficient based on thirty-six separate lawsuits due to lack of specific details of the suits or indication of finding of liability).

Official reports, documentation, and research:

Reports and research collected from third parties may be used to contribute to the case as circumstantial evidence.

- Academic report results sufficient for allegation: "I accept the Fagan Report's conclusion that 24.37 percent of recorded stops and frisks during the period 2004 through 2009 'lack sufficiently detailed documentation to assess their legality,' while 6 percent of stops 'lack legal justification.' . . . [T]he questionable constitutionality of 30 percent of stops is sufficient to allege that the custom is widespread." City's motion for summary judgment denied. *Floyd v. City of N.Y.*, 813 F. Supp. 2d 417, 446 (S.D.N.Y. 2011).
- Report's conclusions cannot be used to infer a custom beyond the agency/facility in the specific scope of the report: "Simply put, even assuming that the DOJ Report's findings reflect the existence of a 'custom or usage' of DOC officials using excessive force on Rikers Island, those conclusions have limited, if any, application to facilities beyond Rikers Island. And Plaintiff offers no basis to infer that the conclusions of the DOJ Report ought to apply more widely than the facilities to which the DOJ Report is explicitly restricted. As a result, it is not plausible to infer that any 'custom or usage' in existence at DOC facilities on Rikers Island caused Plaintiff's injury in the Bronx." City's motion to dismiss granted. *Aquino v. City of N.Y.*, No. 1:16-cv-1577-GHW, 2017 U.S. Dist. LEXIS 10436, at *11 (S.D.N.Y. Jan. 25, 2017).
- Relevant events of a claim should be in the scope of the timeframe of the report used to infer a custom: Despite defendants' argument "that the Mollen Report cannot be used to support the plaintiff's allegations of municipal liability because it post-dated the investigation at issue," the Report, released in 1994, "reviewed the NYPD's practices over the preceding decade" in which range the "relevant events" of the plaintiff's claims fell and was thus related and reliance on it was proper. Plaintiff's motion for reconsideration on the dismissal of his *Monell* claim against the City granted. *Rodriguez v. City of N.Y.*, No. 21-CV-1649 (AMD) (RLM), 2022 U.S. Dist. LEXIS 104160, at *11-12 (E.D.N.Y. June 7, 2022).
- Academic report showing a lack of proof of constitutionality of large proportion of incidents can point to acquiescence or inadequate action: "Second, as Fagan states, '[t]he fact that the legal sufficiency of 31 percent of all stops cannot be shown suggests that the current regime for regulating the constitutional sufficiency of the huge volume of stops is ineffective and insensitive to the actual conduct of stops.'" City's motion for summary judgment denied, finding disputed issue of fact of whether practice was manifest enough to imply constructive acquiescence due to lack of sufficient documentation of stops. *Floyd*, 813 F. Supp. 2d 417 at 447-48.
- Recordings of supervisory instructions together with statistical evidence in report are sufficient circumstantial evidence of supervisory instructions as cause of practice: "Proof that such quotas and/or pressure have caused the pattern of suspicionless stops will necessarily consist largely of circumstantial evidence. Plaintiffs have presented the smoking gun of the roll call recordings, which, considered together with the statistical evidence, is sufficient circumstantial evidence for this claim to survive summary judgment. Even if plaintiffs'

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evidence of quotas or pressure post-dates the last stop alleged in the Complaint, plaintiffs allege an ongoing pattern that includes, but is not limited to, the specifically alleged incidents. . . . I find that there is a triable issue of fact as to whether NYPD supervisors have a custom or practice of imposing quotas on officer activity, and whether such quotas can be said to be the 'moving force' behind widespread suspicionless stops." *Id.* at 449.

- Academic report, documentary evidence, and plaintiff's and others' testimony together are sufficient: Plaintiff's widespread practice claim of unconstitutional stops in and around NYCHA buildings survived City's motion for summary judgment with: testimony of named plaintiffs; report from the City's Civilian Complaint Review Board substantiating complaints (at a 32 percent rate, three times the rate of similar complaints in other locations); decline to prosecute forms obtained from DA's office (tentatively admissible via exception to hearsay); "abundant testimony" from officers and NYCHA residents and guests with various demographics; Fagan's report on statistical analysis of post-Terry stop worksheet records, which if deemed reliable by a jury found that only 50 percent of NYCHA trespass stops were apparently justified. *Davis*, 959 F. Supp. 2d at 351-55.

III. Conclusion

A claim against New York City for practices of the Administration for Children's Services that violate families' Fourth Amendment protections could potentially proceed under *Monell* liability with a theory of widespread practice within the agency by its officers. The claim would be more likely to succeed with evidence of numerous other instances of the specific type of violation alleged supported by direct evidence, other lawsuits or public complaints of such violations, and third-party research and reports documenting the practice. Future research should examine what allegations have supported *Monell* claims of a widespread practice of due process violations in the Second Circuit. A survey across circuits of how claims against child protective service agencies have fared would also be valuable.

Applicant Details

First Name	**Leena**
Last Name	**Dai**
Citizenship Status	**U. S. Citizen**
Email Address	**kdai@jd24.law.harvard.edu**
Address	**Address** Street **601 Hazelhurst Ave** City **Merion** State/Territory **Pennsylvania** Zip **19066**
Contact Phone Number	**6105512115**

Applicant Education

BA/BS From	**Columbia University**
Date of BA/BS	**May 2018**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Law Review** **Harvard Journal of Law and Technology**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Murray, Peter
pmurray@law.harvard.edu
617-384-0031
Fjeld, Jessica
jfjeld@law.harvard.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

LEENA DAI

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June 12, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
14613 U.S. Courthouse
Courtroom 14-B
601 Market Street
Philadelphia, PA 19106

Dear Judge Sánchez:

I am writing to apply for a clerkship in your chambers for the 2024–2025 term. I am currently a rising 3L at Harvard Law School and an editor of the *Harvard Law Review*. As a Lower Merion native, I'm particularly excited to build my career in Philadelphia.

Please find enclosed my resume, law school grade sheet, undergraduate grade sheet, and writing sample. You will be receiving separately letters of recommendation from the following three professors:

Professor Peter Murray	Professor Jess Fjeld	Professor Ari Peskoe
pmurray@law.harvard.edu	jfjeld@law.harvard.edu	apeskoe@law.harvard.edu
(617) 384-0031		(617) 495-4425

During law school, my position as an Executive Editor for *Harvard Law Review* has sharpened my skills in legal research and writing. Beyond learning Bluebook minutiae, I am constantly researching and editing legal scholarship for accuracy and concision. From substantive source-characterization checks to overall structural revisions, I engage intimately with an article until the day of publication. I would bring the same attention and commitment to a clerkship in your chambers.

Thank you very much for your time and consideration.

Sincerely,

Leena Dai

LEENA DAI

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EDUCATION

HARVARD LAW SCHOOL. J.D. Candidate, May 2024
Activities: *Harvard Law Review*, Executive Editor
Harvard Journal of Law and Technology, Technology Editor
Harvard Asian Pacific American Law Students Association, Social Committee Member

PEKING UNIVERSITY. Master of Law in China Studies (Law and Society), July 2020
Honors: Yenching Scholar (2.7% acceptance rate)

COLUMBIA UNIVERSITY. B.A. in Economics, Minor in Chinese Literature, May 2018

EXPERIENCE

CONSERVATION LAW FOUNDATION. Boston, MA. Strategic Litigation Intern (incoming), July 2023–Aug 2023

SIDLEY AUSTIN LLP. Washington, DC. Summer Associate, May 2023–July 2023
- Conduct research and draft memo summarizing emerging trends in CERCLA enforcement
- Draft client alert analyzing legal implications of the recent Supreme Court case *Sackett v. United States* on the scope of federal agency jurisdiction over "waters of the United States"

CITY OF BOSTON, LAW DEPARTMENT. Boston, MA. Legal Intern, Jan 2023–Apr 2023
- Drafted various motions including Motions to Dismiss for § 1983 *Monell* claims, Americans with Disabilities Act claims, and Title VI claims, as well as oppositions to motions for attorney's fees
- Conducted legal research on topics including: separation of powers under Boston's City Charter between City Council and Mayor in allocating annual budget; consent order terms and class action attorney's fees for frivolous appeals; and scope of 30(b)(6) witness depositions
- Composed memo for City's Environmental Department on vertical federalism and preemption for ordinance on building construction and fossil fuel infrastructure

HARVARD CYBERLAW CLINIC. Boston, MA. Student Advisor, Sep 2022–Dec 2022
- Drafted privacy policy for clean energy nonprofit bringing software for Distributed Energy Resources to underserved communities in rural New England
- Researched electric coops and ethical and distributive issues of electric grid modernization

KING & SPALDING LLP. Washington, DC. Summer Associate, May 2022–July 2022
- Conducted legal research and drafted portion of appellate brief for Fourth Circuit on statutory interpretation of Telephone Consumer Protection Act's prohibition on unsolicited commercial advertising
- Reviewed innocence cases and assessed viability for appeal by conducting factual investigations and writing screening memos. Supporting documents included medical records, police records, trial transcripts, and affidavits
- Drafted motion in limine and compiled expert witness reports for pro bono child custody case. Researched opposing counsel's expert witnesses and drafted cross-examination questions
- Compiled memo summarizing differences in argument between opposing counsel's appellate and district court briefs for Federal Circuit patent infringement case

ATARAXIA VENTURES. Singapore. Data Scientist, June 2019–Aug 2021
- Led all data projects for early-stage venture capital firm investing in health, clean energy, and sustainable foods
- Managed three interns by drafting project proposals and supervising day-to-day tasks

PERSONAL

LANGUAGES: Mandarin (advanced), Spanish (proficient), Cantonese (basic), French (basic)
HOBBIES: Backpacking (Everest Base Camp, Tour du Mont Blanc), Muay Thai, videogames (competitive Tetris)

Harvard Law School

Date of Issue: June 6, 2023
Not valid unless signed and sealed
Page 1 / 1

Record of: Kelly Leena Dai
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 7 Charles, Guy-Uriel	P	4
1002	Criminal Law 7 Kamali, Elizabeth Papp	P	4
1006	First Year Legal Research and Writing 7A Tobin, Susannah	H	2
1003	Legislation and Regulation 7 Rakoff, Todd	P	4
1004	Property 7 Smith, Henry	P	4

Fall 2021 Total Credits: 18

Winter 2022 Term: January 04 - January 21

1051	Negotiation Workshop Todd, Gillien	CR	3

Winter 2022 Total Credits: 3

Spring 2022 Term: February 01 - May 13

3137	China and the International Legal Order Wu, Mark	H	2
1024	Constitutional Law 7 Gersen, Jeannie Suk	P	4
1001	Contracts 7 Coates, John	P	4
1006	First Year Legal Research and Writing 7A Tobin, Susannah	H	2
1005	Torts 7 Sargentich, Lewis	P	4

Spring 2022 Total Credits: 16
Total 2021-2022 Credits: 37

Fall 2022 Term: September 01 - December 31

8004	Cyberlaw Clinic Bavitz, Christopher	H	3
2674	Cyberlaw Clinic Seminar Bavitz, Christopher * Dean's Scholar Prize	H*	2
2074	Environmental Law Lazarus, Richard	P	4
2079	Evidence Murray, Peter	H	2
2829	Wildlife Law Glitzenstein, Eric	H	2

Fall 2022 Total Credits: 13

Winter 2023 Term: January 01 - January 31

2050	Criminal Procedure: Investigations Whiting, Alex	P	3

Winter 2023 Total Credits: 3

Spring 2023 Term: February 01 - May 31

8099	Independent Clinical - City of Boston - Law Department Fjeld, Jessica	CR	3
2974	State Energy Law Peskoe, Ari	H	2
2234	Taxation Warren, Alvin	H	4
2958	The International Law of the Sea Kraska, James	H	3

Spring 2023 Total Credits: 12
Total 2022-2023 Credits: 28

Fall 2023 Term: August 30 - December 15

2086	Federal Courts and the Federal System Goldsmith, Jack	~	5
2169	Legal Profession: Public Interest Lawyering Wacks, Jamie	~	3

Fall 2023 Total Credits: 8

Winter 2024 Term: January 02 - January 19

2249	Trial Advocacy Workshop Sullivan, Ronald	~	3

Winter 2024 Total Credits: 3
Total 2023-2024 Credits: 11
Total JD Program Credits: 76

End of official record

Assistant Dean and Registrar

HARVARD LAW SCHOOL
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Cambridge, Massachusetts 02138
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Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is a great pleasure for me to submit to you this letter of recommendation in behalf of Leena Dai, HLS 2024, as an applicant for your judicial clerkship commencing in 2024.

Leena Dai was a member of my course on Evidence during the fall semester 2022. She was a prepared and helpful contributor to our class discussion. Her examination was graded “Honors" which would put it in the top 20% of examinations in a class of 49 students. Her performance on Part II of the exam, which featured short answers to evidence questions raised during the course of a hypothetical trial, was particularly strong. It is worth noting that her work in three other courses taken during the fall semester of her second year was rated "Honors” as well.

Leena’s HLS credentials are further augmented by her work as Executive Editor of the Harvard Law Review, which should be excellent preparation for the kind of work she would be doing as a judicial clerk. She has rounded out a strong academic background with a year studying in Peking, China.

Leena and I have had the opportunity to discuss her potential future paths both at a student luncheon and later individually. She has a strong orientation toward public interest law which is evident in her summer work at the Conservation Law Foundation and in her fall 2022 clinical placement at the Harvard Cyberlaw Clinic.

In my judgment Leena Dai is an excellent prospect for your clerkship, for which she has my enthusiastic recommendation.

Sincerely,

Peter L. Murray
Visiting Professor of Law

Peter Murray - pmurray@law.harvard.edu - 617-384-0031

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am pleased to recommend Harvard Law School student Leena Dai for a judicial clerkship. I have had the pleasure of working with Leena first during her participation as a student in the Clinic and related Cyberlaw Clinic Seminar during the fall semester, 2022. Since then, I also supervised her case comment for the Harvard Law Review as well as her independent clinical at the City of Boston Law Department in the spring semester, 2023. Leena stands out among her peers for her diligence, professionalism, and extraordinary level of insight. I think she will make an exceptional law clerk.

By way of background, I am a Lecturer on Law at Harvard Law School and the Assistant Director of the Cyberlaw Clinic, a clinical program that is based at the Berkman Klein Center for Internet & Society, where we focus our practice at the intersection of social justice, law, and technology. I supervise students in the Clinic and co-teach the Clinic seminar, which students take concurrently, as well as other classes at the law school. Before coming to Harvard, I practiced law first at a large law firm and then in-house at a public media organization. I write from years of experience supervising students, legal interns, and junior attorneys.

Leena earned a Dean's Scholar designation for her extraordinary work in the Cyberlaw Clinic seminar, and a grade of Honors for the clinical component. As part of the seminar, Leena and her peers were required to present on a challenge they encountered in client representation. Leena's presentation was a model, capturing the nuance of the assignment. Leena's client advocates for an electrical grid update known as transactive energy, and the field is complex and technical, but the compelling PowerPoint presentation Leena designed effectively communicated the fundamentals of the system to her classmates. On that foundation, Leena led a sophisticated discussion of the ethical and social justice implications of transactive energy, including how to engage her engineer client—who was more interested in how to build the system than its social implications—in these discussions. We have more than 30 students in the Clinic seminar each semester; it is a credit to Leena that nearly a year later, I retain the substance of her presentation as well as great confidence in her communication skills.

Leena was supervised in the Cyberlaw Clinic by my colleague Susan Crawford, who also expressed her admiration for the way that Leena took on a "complex, novel, and challenging project," and "conquered the material." Susan also complimented Leena's professionalism, thoughtful questions, and ability to develop rapport with her client, concluding that her "commitment to development and growth is nothing short of inspiring… She is an extraordinarily talented person, and she will be an enormously valuable lawyer."

My colleague's observation that Leena is unusually engaged in her growth and development is apt. I do not generally find that students who are as strong in their writing and legal analysis as Leena is seek out and incorporate feedback to the extent that she does. Both in supervising her case comment and her independent clinical, I was struck by the incisive questions she put to me as well as the strength of her revision and reflection processes.

I was surprised, when reviewing her transcript to compose this letter, that her grades, particularly during 1L, were not especially strong. My suspicion is that Leena's talents are more apparent in a workplace than a lecture hall. I do not doubt that as a clerk, she will apply those talents to understand her judge's needs in perfect detail—she does not cut corners—and deliver exceptional work product.

Leena's ultimate career goal is to litigate on behalf of state or local government, in an attorney general's office or city law department. I believe that she will take advantage of her clerkship to study and unpack the written and oral arguments of the parties appearing before her judge, to better craft persuasive advocacy in future. Her research and writing skills are already impressive, and this will be an opportunity to refine them even further under her judge's mentorship.

I believe Leena to be an exceptional young attorney, and recommend her unreservedly. The chambers that brings her on will be lucky indeed. Please feel free to contact me at jfjeld@law.harvard.edu if you have further questions or if there is anything I can do in support of Leena's application.

Very truly yours,

/S/ Jessica Fjeld
Lecturer on Law, Harvard Law School
Assistant Director, Cyberlaw Clinic

WRITING SAMPLE

Leena Dai
62 Prentiss St.
Cambridge, MA 02140
(610) 551-2115

In May 2022, as an incoming 2L at Harvard Law School, I prepared the attached case comment for the *Harvard Law Review* write-on competition. The case comment critiques the Fifth Circuit's 2021 decision, *United States v. Smith*, in which the court held that touching alone does not constitute actual possession under the federal felon-in-possession statute.

While I have edited the piece since submission for Bluebook and other minor formatting revisions, the piece has not been edited by anyone other than myself. I have received permission from the *Harvard Law Review* President to use this case comment as a writing sample.

The Supreme Court's 1962 ruling in *Robinson v. California*[1] prohibited the criminalization of statuses like alcoholism and addiction, echoing the common law tenet that crimes must involve a guilty act. However, the Court mitigated the ruling's effectiveness by retaining the validity of statutory crimes of possession.[2] Possession falls in the gray area between a status and an actus reus: it is non-violent, it is inchoate, and there is no specific conduct associated with it. As a result, lower courts have wrestled with a wide swath of physical acts to determine what "possession" includes. Recently, in *United States v. Smith*,[3] the Fifth Circuit held that simply touching a gun is insufficient for conviction under 18 U.S.C. § 922(g), which prohibits felons from possessing firearms. While a positive step in cabining broad interpretations of "possession," the Fifth Circuit's holding that touching alone is *never* enough to qualify for possession simply raises the threshold for conviction, resulting in fewer false positives (that is, conviction of benign conduct) but also more false negatives (that is, failure to convict and deter dangerous conduct). To reduce both types of error, the court should have based its reasoning on the relationship between the defendant's physical act and the creation of risk, which is the underlying policy rationale behind crimes of possession. This would have encouraged a reengagement with the question of *why* we punish, as well as crafted the rules to better serve the aims of reducing overall societal risk and transitioning felons back into their communities.

Tredon Smith was a felon who had been convicted in 2015 for aggravated assault with a deadly weapon.[4] He was reportedly the leader of a gang in Texas that was known for burgling vehicles, drug trafficking, and stealing and selling firearms.[5] Sometime prior to April 2019, Smith touched a .38 caliber revolver while visiting a friend's house.[6] The revolver was later recovered by police officers as a stolen item along with two other firearms.[7] Smith was arrested as a suspect for theft of the guns.[8] During the

[1] 370 U.S. 660 (1962).
[2] *Id.* at 664.
[3] 997 F.3d 215 (5th Cir. 2021).
[4] *Factual Basis*, 2–3.
[5] *Smith*, 997 F.3d at 225.
[6] *Id.* at 218.
[7] *Id.*
[8] *See id.*

interrogation, the detective showed Smith pictures of the firearms and asked him "why his fingerprints would be on them."[9] Smith responded, "I don't remember touching the rest of those guns, but I know for a fact I touched the .38 [revolver]."[10] Two months later, police arrested Smith on a second occasion in reference to several reports of late-night vehicle burglary.[11] The owner of one of the cars stated that the burglars had attempted to steal two rifles from the vehicle, as the guns had previously been tucked in the backseat but were found leaning against the center console.[12] In response to these incidents, Smith was indicted on two charges for violating 18 U.S.C. § 922(g)(1), which prohibits felons from actually or constructively possessing firearms — once for touching the revolver at his friend's house, and once for moving the guns in the burgled vehicle.[13]

Smith submitted a guilty plea to the U.S. District Court for the Western District of Texas on the count of touching the revolver at his friend's house,[14] while the government dropped the charge for the two rifles in the car.[15] The district court accepted "touching" the firearm as sufficient basis for conviction of "possession" under § 922(g)(1) and sentenced Smith to fifty-seven months of imprisonment and three years of supervised release.[16] Smith subsequently appealed to the U.S. Court of Appeals for the Fifth Circuit, arguing that mere touching does not equate to possession, and that he pleaded guilty only because he mistakenly thought it was.[17]

The Fifth Circuit vacated and remanded.[18] Writing for the panel, Judge Haynes held that the district court was in plain error for accepting Smith's guilty plea because touching alone is insufficient to convict for possession.[19] To find plain error, Judge Haynes applied the framework of Rule 52 of the Federal Rules of Criminal Procedure and *Puckett v. United States*.[20] Under this framework, reviewing courts ask whether

[9] *Factual Basis*, *supra* note 4, at 2.
[10] *Id.*
[11] *Id.* at 1.
[12] *Id.*
[13] *Smith*, 997 F.3d at 226.
[14] *Consent to Administration of Guilty Plea and Fed. R. Crim. P. 11 Allocation by United States Magistrate Judge.*
[15] *Smith*, 997 F.3d at 226.
[16] *Id.* at 218.
[17] *Id.* at 225.
[18] *Id.* at 218.
[19] *Id.* at 224.
[20] 556 U.S. 129, 135 (2009).

there was a "clear or obvious error" of law that affected the defendant's substantial rights.[21] If so, the court may exercise discretion to correct the error if it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings."[22]

In answering the first part of the inquiry, Judge Haynes determined that the district court clearly erred in accepting the guilty plea, as Smith's touching did not amount to possession.[23] Judge Haynes declared that for both constructive and actual possession, "absent some indication that the defendant controlled the firearm, conviction is improper under either theory."[24] Smith's case involved actual possession, since the government had abandoned any constructive possession claim because the gun was at Smith's friend's house.[25] In reaching her conclusion that Smith did not exercise control over the revolver — and thus did not actually possess it — Judge Haynes offered three supporting arguments.

First, the government's evidence from the interrogation failed to prove that Smith exercised control over the guns. The government had not produced evidence of Smith's DNA on the guns; instead, the detective had simply asked him "why his fingerprints *would* be there."[26] Such lines of questioning, according to Judge Haynes, were not "evidence of a fact," as the detective asked the same question about the two guns Smith had not touched at all.[27] Judge Haynes was also unconvinced that Smith's ability to identify the caliber of the revolver without the officer's prompting was indicative of prior control.[28] Such information could be deduced simply by looking at the photo.[29] Second, Judge Haynes applied a textualist approach to find that both dictionary definitions as well as the commonsense understanding of the word "possess" do not encompass mere touching.[30] She explained that "to possess something is to control it" or "to be master of" the thing.[31] Including tactile feeling would "wildly expand the logical definition" of the

[21] *Smith*, 997 F.3d at 219.
[22] *Id.*
[23] *Id.* at 224.
[24] *Id.* at 219.
[25] *Id.* at 220.
[26] *Id.* at 220.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 221–23.
[31] *Id.* at 221.

word.[32] Finally, Judge Haynes cited Fifth Circuit precedent as well as other circuit case law supporting the assertion that touching alone does not establish physical dominion over the item.[33]

After establishing the presence of a clear error, Judge Haynes found that the error negatively affected Smith's substantial rights and was therefore not harmless. According to Smith, but for his mistaken belief that touching amounts to possession, he would not have pleaded guilty to the charge.[34]

Judge Haynes then argued that the error so egregiously undermined the integrity of the judicial proceedings that the court should exercise its right of correction by vacating and remanding the case. She explained that "the fact that Smith is or could be innocent . . . is reason alone . . . to correct the district court's error."[35] Further, even if Smith could seek other post-conviction remedies, correcting the error directly on appeal was the superior option because it would provide Smith with relief without further delay.[36]

Judge Smith wrote a dissenting opinion. According to Judge Smith, fingerprint evidence suffices to show actual possession, which brevity of contact does not negate.[37] He rejected the majority's argument on factual and legal grounds. On the facts, Judge Smith argued that the majority failed to consider the entire record beyond the plea colloquy in reviewing for error. He underscored the Defendant's reputation as a criminal, as well as accused the Defendant of disingenuously seeking to "unwind" his part of the plea bargain he had previously struck with the government to drop his other charge.[38]

On the majority's legal analysis, Judge Smith excoriated their reasoning as unsound. First, he argued that they confused constructive possession with actual possession. According to Judge Smith, the majority applied precedent that involved constructive rather than actual possession, erroneously transplanting the "ownership" requirement for the former onto the latter[39] while ignoring precedent on

[32] *Id.* at 222.
[33] *Id.* at 224.
[34] *Id.* at 225.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 230 (Smith, J., dissenting).
[38] *See id.* at 226.
[39] *Id.* at 227.

actual possession that held that temporary touching and fingerprints alone are sufficient to support conviction.[40] Further, Judge Smith disparaged the majority for "cherry-pick[ing]" dictionary definitions that describe constructive rather than actual possession.[41] He pointed to alternative dictionaries that define actual possession as "seiz[ing] or gain[ing] control of" a thing, which are actions that can encompass mere touch.[42]

In addition to criticizing the majority for confusing requirements of constructive possession for actual possession, Judge Smith argued that the majority had engrafted an element of an affirmative defense onto the requirements for establishing a prima facie case.[43] Brevity of contact, together with a justification like self-defense or duress, can be raised as an affirmative defense to exculpate a felon from a charge.[44] Such a defense, however, does not negate any element of an offense. Thus, by focusing on the temporariness of touching, the majority had shifted brevity of contact from a defense to the prosecution's burden of proof.

Altogether, Judge Smith argued that the majority had muddled the requirements of actual possession by imbuing elements of constructive possession and the affirmative defense of brevity. In doing so, the majority was opening a "pandora's box" that would force lower courts to "answer myriad bizarre questions" that they are poorly equipped to answer.[45]

While *Smith* marks a positive step in cabining broad interpretations of "possession" under § 922(g), the Fifth Circuit's holding that touching never amounts to possession simply raises the threshold of proof for prosecution. Although this has the beneficial effect of lowering false positives (that is, incorrectly convicting an innocent felon), the tradeoff is an increase in false negatives (that is, incorrectly letting a guilty felon go free). The court should have instead grounded their reasoning in the policy rationale of risk reduction. A framework targeted at assessing risk would reduce both types of error by forcing courts to

[40] *Id.* at 228.
[41] *Id.*
[42] *Id.* at 229.
[43] *Id.* at 230.
[44] *Id.*
[45] *Id.*